TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~282~~ 91

WILLIAM P. HALLIDAY, HENRY L. HALLIDAY, EDWIN W. HALLIDAY, THOMAS W. HALLIDAY, AND RUFUS P. ROBINS, PLAINTIFFS IN ERROR,

vs.

THOMAS A. HAMILTON AND JOHN L. DUNNICA, PARTNERS AS HAMILTON AND DUNNICA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 15, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 283.

WILLIAM P. HALLIDAY, HENRY L. HALLIDAY, EDWIN W. HALLIDAY, THOMAS W. HALLIDAY, AND RUFUS P. ROBINS, PLAINTIFFS IN ERROR,

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Thomas A. Hamilton and John L. Dunnica, partners under the name and style of Hamilton & Dunnica, respondents, and William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins, appellants, a manifest error hath happened to the great damage of the said William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins, as by their complaint appears; we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-

2 cerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the fifteenth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-third.

[SEAL.]

J. A. JONES,
Clerk of the Circuit Court of the United States for the Southern District of Illinois.

3 Pleas in the circuit court of the United States of America for the southern district of Illinois, at a term begun and held at Springfield, in said district, on the first Monday of January, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-third year.

Present, the Hon. Samuel H. Treat, district judge of said district, and, pro tempore, sole judge of said circuit court, in the absence of the Hon. David Davis, one of the justices of the Supreme Court of the United States of America, assigned to and presiding in said judicial circuit.

THOMAS A. HAMILTON AND JOHN L. DUNNICA, partners of the firm of Hamilton and Dunnica,
v.
WILLIAM P. HALLIDAY, HENRY L. HALLIDAY, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins.
} In trover and trespass.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

4 Thomas A. Hamilton and John L. Dunnica, plaintiffs, partners of the firm of Hamilton and Dunnica—the former a citizen of the State of Tennessee, and the latter a citizen of the State of Louisiana—put in their place, Messrs. Stuart, Edwards and Brown, their attorneys,

against William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins, defendants, citizens of the State of Illinois, and residents of the said southern district of Illinois, in a plea of trespass on the case.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the eighteenth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, the said plaintiffs, by their said attorneys, filed in the office of the clerk of the circuit court of said district their bond for costs and declaration; which said bond for costs and declaration are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Circuit court, January term, A. D. 1868.

5 THOMAS A. HAMILTON & JOHN L. DUNNICA, partners under name & style of Hamilton & Dunnica,
vs.
WILLIAM P. HALLIDAY, HENRY L. HALLIDAY, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins. } In trover.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State, and of the United States.

Dated this 18th day of Dec., 1867.

STUART, EDWARDS & BROWN.

(Indorsed:) Filed December 18, A. D. 1867.

J. A. JONES, *Clerk.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

United States circuit court, January term, A. D. 1868.

Thomas A. Hamilton and John L. Dunnica, partners under name and style of Hamilton & Dunnica, plaintiffs in this suit—the former,
6 who is a citizen of the State of Tennessee, and the latter, who is a citizen of the State of Louisiana—by Stuart, Edwards, & Brown, their attorneys, complain of William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins, of a plea of trespass on the case:

For that whereas the said plaintiffs heretofore, to wit, on the 31st day of August, A. D. 1867, at the district aforesaid, was lawfully possessed, as of their own property, of certain goods and chattels, to wit: Twelve hundred sacks of white corn and fifty sacks of yellow corn, of great value, to wit, of the value of six thousand dollars of lawful money of the United States, and being so possessed, the said plaintiffs afterwards, to wit, on the day and year above mentioned, at the district aforesaid,

casually the said goods and chattels out of their possession; and the same afterwards, to wit, on the day and year aforesaid, came to the possession of the said defendants by finding. Yet the said defendants well knowing the said corn to be the property of the said plaintiffs, and of right to belong and appertain to them, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs in this behalf, have not as yet delivered the said corn to the said
7 plaintiffs, although often requested so to do; and afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, converted and disposed of the said corn to their own use, to the damage of the said plaintiffs of the sum of six thousand dollars; wherefore they bring this suit.

By STUART, EDWARDS & BROWN,
Attorneys for Plaintiffs.

(Indorsed:) Filed December 18, 1867.

J. A. JONES, *Clk.*

Afterwards, to wit, on said eighteenth day of December, of the year aforesaid, a summons was issued in said entitled cause out of the office of the said circuit clerk, directed and delivered to the marshal of said district to execute; which said summons is in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you that you summon William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus
8 P. Robbins, if they be found in your district, to be and appear before our circuit court of the United States for the southern district of Illinois, at the next term thereof, to be holden at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto Thomas A. Hamilton & John L. Dunnica, partners under name and style of Hamilton and Dunnica, in a plea of trover to their damage, as they allege, of six thousand dollars; and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this eighteenth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-second year.

[L. S.] J. A. JONES, *Clerk.*

Which said writ was afterwards returned by said marshal, indorsed in the words and figures following, to wit:

Executed this writ Dec. 20th, 1867, by reading the same to the within-named W'm P. Halliday, Henry L. Halliday, & Tho's W. Halliday.

JOHN LOGAN, *U. S. M.*,
Per E. C. MATHENY, *Deputy.*

9 I hereby appoint John Hogan my special deputy to execute this writ.

Dec. 23rd, 1867.

JOHN LOGAN, *U. S. Marshal.*

Executed this writ on the 28th day of December, A. D. 1867, by reading the same to the within-named Rufus P. Robbins. Edwin W. Halliday not found in my district.

JOHN LOGAN, *U. S. M.*,
Per JOHN HOGAN,
Acting Special Deputy.

(Indorsed:) Filed Dec. 31, A. D. 1867.

J. A. JONES, *Clerk.*

10 Afterwards, to wit, on the first day of April, of the year aforesaid, came again said plaintiffs, by their attorneys, and filed in said clerk's office an added count to their declaration; which said added count is in the words and figures following, to wit:

2d.

2 count in trespass filed by consent.

And also for that the said defendants, to wit, on the day and year aforesaid, to wit, at the district aforesaid, with force and arms, seized, took, and carried away certain other goods and chattels of the said plaintiffs, to wit, twelve hundred sacks of white corn and fifty sacks of yellow corn, of the value of six thousand dollars, then and there found and being, and converted and disposed of the same to their own use, to wit, at the district aforesaid, to wit, on the day and year aforesaid, and other wrongs to the said plaintiffs then and there did, against the peace of the United States of America, and to the damage of the said plaintiffs six thousand dollars; wherefore they sue, &c., &c.

STUART, EDWARDS & BROWN, *P. Q.*

(Indorsed:) Filed April 1, 1868.

J. A. JONES, *Clerk.*

11 Afterwards, to wit, at a term of said court begun and held at the city of Springfield, in said district, on the first Monday of June, in the year of our Lord one thousand eight hundred and sixty-eight, and on the second day of said June, being the second day of said term, the following proceedings were had in said cause, to wit:

THOMAS A. HAMILTON ET AL.
v.
WILLIAM P. HALLIDAY ET AL. } Trover.

Now come the parties, by their attorneys, and, on the plaintiffs' motion, the defendants are ruled to plead by Tuesday, the eighth day of June instant, and, by agreement, this cause is set for trial on Tuesday, the sixteenth day of June instant.

Afterwards, to wit, on the eighth day of June, in the year last aforesaid, came said defendants, by Messrs. Palmer and Hay, their attorneys, and filed their plea herein; which said plea is in the words and figures following, to wit:

12 THOMAS A. HAMILTON ET AL.
vs.
WILLIAM P. HALLIDAY ET AL.

The defendants, William P. Halliday, Henry L. Halliday, Thomas W.

Halliday, and Rufus E. Robbins, come and defend the wrong & injury, when, &c.; they say are not guilty as alleged in plaintiffs' declaration; and of this they put themselves upon the country.

PALMER & HAY, *for Def'ts.*

Pl'ff likewise.

STUART, EDWARDS & BROWN, *P. Q.*

(Indorsed:) Filed June 8, 1868.

J. A. JONES, *Clerk.*

Afterwards, to wit, at a term of said court begun and held at the city of Springfield, in said district, on the first Monday of January, in the year of our Lord one thousand eight hundred and sixty-nine, and on the twenty-ninth day of said January, being the twenty-third day of said term, the following further proceedings were had in said cause, to wit:

THOMAS A. HAMILTON AND JOHN L. DUNNICA, partners under name and style of Hamilton and Dunnica,
vs.
WILLIAM P. HALLIDAY, HENRY L. HALLIDAY, Edwin W. Halliday, and Rufus P. Robbins.
} In trover.

This day again come the parties, by their attorneys, and, by agreement, this cause is set for trial on Friday, the fifth day of February next.

13 Afterwards, to wit, on the fifth day of February, being the twenty-ninth day of said term, in the year last aforesaid, the following further proceedings were had in said cause, to wit:

THOMAS A. HAMILTON & JOHN L. DUNNICA, partners under name & style of Hamilton & Dunnica,
v.
WILLIAM P. HALLIDAY, HENRY L. HALLIDAY, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins.
} In trover & trespass.

Now come the plaintiffs, by Messrs. Stuart, Edwards & Brown, their attorneys, and also the defendants, by Messrs. Hay & Green, their attorneys, and issue being joined, now come a jury of good & lawful men, to wit, Consul Sampson, N. C. Greene, Ward Bartram, Thomas H. Dillon, W. W. Douglass, J. M. Cutright, Daniel Buven, John Young, W. W. Inglish, James M. Darneille, John Kavanaugh, and I. T. Parker, who were duly elected, tried, and sworn well and truly to try said issue, and having heard the allegations of the parties and their evidence, and the argument of counsel, retired, under instructions from the court, to
14 consider upon their verdict, and afterwards returned into court the following verdict, to wit: "We, the jury, find the defendants guilty, and assess the plaintiffs' damages to the sum of three thousand four hundred and thirty-six dollars and twenty-four cents."

Afterwards, to wit, on the fifteenth day of February, being the thirty-

seventh day of said term, in the year last aforesaid, the following further proceedings were had in said cause, to wit:

THOMAS A. HAMILTON AND JOHN L. DUNNICA, partners under name & style of Hamilton & Dunnica,
v.
WILLIAM P. HALLIDAY, HENRY L. HALLIDAY, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins.
} In trover & trespass.

Now come again the parties, by their atorneys, and the court, having heard the arguments of counsel on the motion heretofore entered for a new trial herein, and being sufficiently advised in the premises, overrules said motion.

It is therefore ordered and adjudged by the court that the
15 plaintiffs have and recover of and from the said defendants the sum of three thousand four hundred & thirty-six dollars and twenty-four cents, their damages so found and assessed by the jury, together with the sum of one hundred and sixty-seven dollars and four cents, their costs by them about their suit in this behalf expended, and that they have execution therefor.

And thereupon the defendants, by their attorneys, tender their bill of exceptions, which is signed, sealed, and ordered to be made a part of the record in this cause.

Whereupon on the same day and year last aforesaid came the said defendants and filed their bill of exceptions herein, which said bill of exceptions is in the words and figures following, to wit:

Be it remembered that on the trial of this cause before the court and jury the plaintiffs read in evidence to the jury a draft and the endorsements and acceptance thereon, and of all which the following is a
16 copy:

"2,500. ST. LOUIS, *Aug.* 31, 1867.

Twenty days after date pay to the order of ourselves, with current rate of ex. on N. Y., twenty-five hundred dollars, value received, and charge the same to account of shipment, 1,200 bags white corn, per Bee & barges. 50 bags yellow corn.

SHERWOOD, KARNS & CO.

To Mess. HAMILTON & DUNNICA, *New Orleans, La.*

No. 793.

[1 dollar int. rev. 25 int. rev.]

(Indorsed:) Hamilton & Dunnica, per G. P. Harrison.

(Indorsed:) Paid.

(Endorsed:) Sherwood, Karns & Co., Cole Brothers.

Pay J. S. Delery, esq., cashier, or order.

R. A. BETTS, *A. C.*
A. W. MEAD,
Notary Public."

(Indorsed:) Exhibit B.

And said plaintiff further read in evidence a bill of lading attached to said draft which said bill of lading was in the words & figures following:

"Received, St. Louis, Aug. 31, 1867, from Sherwood, Karns & Co., in apparent good order, on board the good steamboat Bee & barges, the following articles, marked as below, which are to be delivered without delay, in like order, (the dangers of navigation, fire, explosion, and collision excepted,) to Hamilton & Dunica, at N. Orleans, on levee
17 or wharf, he or they paying freight at the rate of annexed, or thirty-five cents p'r sacks, and charges, $——

1st class, per 100 lbs.	
2d " " "	
3d " " "	
4th " " "	
P'k'g freight.	
For the lot.	

In witness whereof the master, clerk, or agent of said boat, has affirmed to—bills of lading, all of this date and tenor, one of which being accomplished the others to stand void.

Marks.	Articles.	Gross weight.	1st class.	2nd class.	3rd class.	4th class.	Packages.
20,305	1,200 sacks white corn. 50 " yellow do.						

Sh'p'd Sept. 12, '67.

CHA'S SCUDDER, *Ag't.*

(Endorsed:) B. L. 218, per steamer Bee & barges, 1,250 sacks corn. Rec'd Sept'b'r, 1867, ac. Sherwood, Karns & Co.

(Indorsed:) Exhibit "A."

A. W. MEAD, *Notary Public.*

And said plaintiffs further read in evidence the deposition of Charles Scudder, E. G. Hill, William K. Sherwood, Robert A. Betts, John L. Dunnica, and G. P. Harrison; which said depositions are respectively as follows:

Deposition of Charles Scudder, taken in St. Louis, Mo., before A. W. Mead, a notary public, May 2, 1868.

18 Charles Scudder, being produced, sworn, and examined on the part of the plaintiffs, deposes and says:

I reside in St. Louis, Missouri. I was engaged in the steamboat agency business during the year 1867. I know of a shipment of 1,250 sacks of corn made by Sherwood, Karns & Co., in August, 1867. I know of the corn being sold. Received an order from J. W. Booth & Sons "on 'change," to deliver the corn on the steamer Bee & barges at Price's Landing. The shipment was made by Sherwood, Karns & Co. There was a bill of lading given. (Witness shown paper marked Exhibit A, hereto annexed,* and says:) This is the bill of lading; it is signed by Charles Scudder, as agent of the barge company. It was signed on the order of J. W. Booth & Sons, in favor of Sherwood, Karns & Co., for the corn, which was then at Price's Landing, on the Mississippi River. The Bee & barges belonged to the Mississippi Valley Trans-

* Bill of lading on page 17.

portation Company. I was the agent authorized to sign bills of lading for that company. If I recollect right, Mr. Booth gave me the order for the corn, but I cannot recollect positively whether it was Mr. Booth or Sherwood, Karns & Co.

Cross-examined.

The order for the corn was delivered to me "on 'change." The Bee & barges were then laying at Plum street wharf, St. Louis.

Ques. How long after the date of the bill of lading did the Bee & barges leave?

19 Ans. I cannot say as to the time of leaving. I received the order the same day I gave the bill of lading. I was "on 'change" when the order for the corn was given. It was given to me personally. The bill of lading was based on that order. I signed the bill of lading upon the face of the order for the corn, as agent for the Mississippi Valley Transportation Company. I can give the substance of that order. It was directed to some parties at Price's Landing, and ordered them to deliver 1,250 sacks of corn to the Bee & barges for account of Sherwood, Karns & Co., signed by J. W. Booth & Sons. I do not remember the date. I recollect by referring to the bill of lading. I think it was the same date as the bill of lading, August 31, 1867. I cannot say when the boat got down to Price's Landing. I can, by referring to my books, tell when she started. I was present at the sale of the corn to Sherwood, Karns & Co. They were buying corn and other produce largely "on 'change" that day. I did not receive any other orders in favor of Sherwood, Karns & Co. that day. I think I issued other bills of lading to them that day.

Ques. Was it not unusual for your company to issue bills of
20 lading for property which you had not received, and which was not in the port where you gave the bill?

(Objected to as irrelevant & incompetent by pl'ffs' counsel.)

Ans. It was not unusual for us to issue them when based on orders. It was unusual, however, for us to sign bills of lading except on orders or on receipt of property. It was not unusual to issue such bills of lading; it was the usual custom where the property was at some other port.

Question. Did you not have apprehensions about not getting that corn?

(Objected to by plaintiffs' counsel as irrelevant and incompetent.)

Answer. I did not until after the Bee left the port of St. Louis.

Ques. What was then the cause of your apprehension?

(Objected to as irrelevant and incompetent.)

Answer. I learned that Sherwood, Karns & Co. had failed.

Ques. Did you learn that they had failed or were about to fail?

(Objected to as incompetent and irrelevant.)

Answer. I learned that they had failed, to the best of my recollection. I learned it from common rumor; cannot say exactly
21 from whom. To the best of my recollection, I delivered the bill of lading to Sherwood himself; it was delivered "on 'change," the same day, during "'change hours," which are from 11 to 12 o'clock.

Ques. Are you in the habit of delivering bills of lading "on 'change?"

(Objected to as incompetent and irrelevant.)

Ans. By request of merchants I frequently do.

Ques. Did Sherwood speak to you about his buying corn that day, and that he desired to ship it?

(Objected to as incompetent and irrelevant.)

Ans. He did.

Ques. For what other produce did you give him bills of lading that day?

(Objected to as incompetent and irrelevant.)

Ans. For flour.

Ques. Can you recollect of issuing any other bill of lading at St. Louis for produce, on an order for produce then at another port below?

(Objected to as irrelevant.)

Ans. I cannot cite any particular case, but have issued such bills.

CHA'S SCUDDER.

22 *Deposition of E. G. Hill, taken on behalf of plaintiff.*

E. G. Hill, being produced, sworn, and examined on the part of the plaintiffs, deposes and says:

During the year 1867 I was loading barges for the Mississi Transportation Company at Cairo, where I resided. I loaded the company at other points on the Mississippi River. (Bill Exhibit A, shown witness, who says:) I never saw this bill before. I had something to do with the loading of 1,250 sacl on the steamer Bee & barges. I had orders from Mr. Weiri the agents of the transportation company, to get some n

23 to Price's Landing, and put this corn on the Bee & barge to work after the Bee & barges came down, and put t the Bee & barges, I think on the 2d or 3d September, 186 Landing is 20 or 21 miles above Cairo, on the Missouri side. was taken to Cairo, and there seized under an attachment. know who attached the corn. The constables or officers came the attachment; the officers were John Hogan & John Wel took the corn. I do not know who were the plaintiffs in the a suit. I know the firm of Halliday Bro's; I have been acqua them some time; I do not know what became of the corn a attached. The corn was seized about the 3d or 4th of Septe or about that time. The boat Bee & barges went on withou

Cross-examined by Alex. Martin, esq., counsel for defend

Question. When you refer in your direct examination t what corn do you mean?

Ans. I mean the corn that I took on at Price's Landing, was taken off at Cairo by attachment. I never saw the bil before to-day, to my knowledge.

24 Ques. In whose custody was the corn lying at the time you took it on board at Price's Landing?

Ans. I forget his name, tho' I know him well. There are two men, partners, there; I received the corn from each one of them; I cannot remember the names of either of them; they kept a store and warehouse there; there was other corn in the warehouse; there were 3 or 4,000 sacks left there after we went away. The corn I took on board had marks on. The corn that was taken off, some was marked "C," some "S," and some "M;" and there was two different kind of M's. The corn left was marked in different ways; some crosses, some "S's," and different kinds of marks; and some was not marked at all. I had other corn on the barges, some 2 or 3,000 sacks, maybe more or less. The other corn was received at St. Louis & Price's Landing. I forget how much

corn was taken on at Price's Landing; some 3 or 4,000 sacks. I do not know for whom I took on any corn at Price's Landing. I do not recollect how the other corn was marked that was taken on at Price's landing; some had no mark, and some was marked in various manners.

25 Ques. What means have you of distinguishing any part of the 3 or 4,000 sacks you put on board there from the rest that was taken on board, or from the rest that was on board?

Ans. By means of the marks. The shipper furnished me with the marks at Price's Landing.

Ques. Were any marks furnished to you by the barge company by which you were to call for the corn?

Ans. No; I cannot say whether there was or not; I should rather think not. I superintended the receiving of it. Mr. Weirick gave me my orders; he told me to get some men, go to Price's Landing, and receive some corn that the boat brought down an order for. I attended to the delivery of the corn at Cairo to the officers. The officers called for 1,250 sacks. They called for marks "S," "C," and "M's," as far as I can recollect. I took the corn to Halliday Brothers' wharf-boat, where it was taken off. It was a public wharf-boat, the same as all the others. The corn that was taken, it was some little mixed with other corn before it was taken off. The corn that was taken at Price's Landing was not much mixed with the other cargo. The corn that was taken on

26 at Price's landing was not mixed; sometimes a tier would fall down, but we could pick out the corn by the marks. We had no difficulty in picking it out by the marks. I do not think there was other corn of similar marks on the barge. I think I am right in this. There was no difficulty in finding the corn that was called for. Halliday & Bro's are in the commission business at Cairo.

Re-examined.

Q. What do you mean by the corn being mixed?

Ans. In a small warehouse the sacks of corn that was marked would be mixed with those which were not marked, and when we wanted to get at it we would have to work it off from the face of the tiers. 1,250 sacks was all the corn that was attached at Cairo on that trip which was on board the Bee & barges. W'm Halliday was on the wharf-boat when the corn was taken out. He had nothing to do with the matter that I know of. I think I took on other corn at Price's Landing on that trip. I think I took some 2 or 3,000 sacks on board the

27 barges at the landing on that trip, tho' I am not certain. I have frequently taken on corn at that landing, sometimes large lots and sometimes small ones. John Hogan, I think, was deputy marshal or marshal of the city, or constable. The biggest lot of corn attached was marked C. 1,250 sacks were attached in all. Some were marked "S" & some "M."

Ques. Have you any doubt of the fact that the corn attached was the same corn put on board at Price's Landing?

(Objected to as incompetent and irrelevant.)

Ans. It was the same corn; I have no doubt in the world it was the same corn.

Ques. How many lots of that size was taken aboard at Price's landing?

Ans. There was but that one lot of 1,250 sacks taken aboard at that trip. I do not know on whose account that corn was shipped. If I did know I have forgotten.

Re-cross-examination.

The other corn we took on board at Price's landing I do not think was in lots. I class this corn which I delivered in Cairo in lots, because it was given to me by itself; the "C" was, I know. I wouldn't be surprised that the other was delivered to me in lots too.

E. G. HILL.

28 *Deposition of William K. Sherwood, taken in St. Louis, Mo., before A. W. Mead, notary public, May* 3, 1868.

William K. Sherwood, being produced, sworn, and examined on the part of the plaintiffs, deposes and says:

I was engaged in the commission business during the year 1867. The style of my house was Sherwood, Karns & Co. (Bill of lading shown witness, Exhibit A.) We made a shipment of corn in August, 1867, to Hamilton & Dunnica, New Orleans, Louisiana. The shipment was made on the date of the bill of lading. "Exhibit A" and this bill of lading was given on an order for 1,250 bags of corn, made by J. W. Booth & Sons on a party or parties at some landing below the city, where I do not remember, nor do I remember the parties names. I made the shipment by the Mississippi Valley Transportation Company. The Bee & barges took the corn. I do not know of my own knowledge what became of that corn. I do not know from Halliday Bro's what became of that corn. That was the only shipment of corn I had on the steamboat Bee & barges.

Question. Do you know of any attachment suit being brought against you by Halliday Bro's, at Cairo?

(Objected to as irrelevant.)

Ans. I have no official information on the subject.

Ques. To whom was that corn shipped?

29 Ans. To Hamilton & Dunnica, New Orleans. After I received the bill of lading, Exhibit A, I took it, or had it taken, to Mess. Cole Brothers, accompanied by a draft on Mess. Hamilton & Dunnica, New Orleans, for, I think, 2,500$. (Paper shown witness marked Exhibit B, and hereto annexed. Witness says this is the draft.) This draft and the bill of lading was taken to Cole Brothers, and the draft was discounted by them, and the proceeds paid to us, (Sherwood, Karns & Co.) The payment was made on the date of the bill of lading; the draft was drawn on the shipment of 1,250 bags of corn, the same mentioned in the bill of lading. The corn was worth at the date of the bill of lading, in St. Louis, between 2,800 & 2,900 dollars.

Question. How long, in the ordinary course of transportation, would it take that corn to reach New Orleans?

Ans. About seven days.

Ques. What was the market value of that corn in New Orleans at the time it would arrive there?

Ans. I do not remember; my recollection is that, at the date 30 of the shipment & purchase, there was a margin of 8 or 12 cents per bushel over the price here; this would amount on the lot to from 208$ to 350$. My recollection is, that the price at New Orleans at this time was $1 35 per bushel. The corn, at the date of the shipment, was the corn that Sherwood, Karns & Co. had purchased. I gave the draft & bill of lading to Cole Brothers when I got their check for the proceeds of the draft. Their check was paid. The draft is signed by Sherwood, Karns & Co., and is endorsed by them; it is also en-

dorsed by Cole Brothers; I know their handwriting. The acceptance is in the handwriting of G. P. Harrison, who was then the cashier of Hamilton & Dunnica. I had done business with Hamilton & Dunnica two years; they were our factors at New Orleans. Our account, at the time of the shipment, stood that we were indebted to them; there was a balance due by us to them.

Ques. What was to be done with the balance of the proceeds of the corn after paying draft?

(Objected to as incompetent and irrelevant.)

31 Ans. The entire proceeds were to be placed to our credit on current account, and the draft to be paid. I did not draw any other draft on that shipment.

Ques. Why did you not?

(Objected to as irrelevant.)

Ans. Because I had received from Cole Bro's all the shipment would bear.

Ques. What was to be done with the surplus, if there was any?

(Objected to as irrelevant.)

Ans. Passed to our credit on account-current with Hamilton & Dunnica.

Cross-examined by Alex. Martin, counsel for defendants.

Truman K. Sherwood & Rufus S. Karns composed the firm of Sherwood, Karns & Co. I think there were samples of the corn shown me; I cannot state who showed me the samples. I think the samples were exhibited to me; but it is so long ago I cannot remember; I do not remember seeing samples of corn the date of the sale. It is within the bounds of possibility that there were no samples shown me, tho' I think they were. I think Booth asked me $1 10 for the corn, but am

32 not positive. I did not accept the first offer, as I remember. The purchase was made at $1 07, I think; but these figures I recall from memory only. I think this is not the price he asked me in the first place, tho' I may be mistaken; the papers have passed out of our hands. We bought this corn for ourselves. We had no order from Hamilton & Dunnica to buy corn. The bill of lading was made out in our office, 20 City Buildings; it was signed "on 'change," or immediately after "'change;" it was signed shortly after it was made out; it is made out by Mr. Karns, my partner; it was signed during 'change hours, or shortly after. I negotiated the bill of exchange the same day during bank hours. The check of Cole Bro's was given on a bank, but I do not remember on what bank; it was given in a check; the check was deposited the same day; the proceeds of the check were used for current business purposes. I do not remember whether or not I bought any other produce "on 'change" that day. We kept our ac's, banking accounts, at the 2d & 3d National Banks. We needed all the funds we could get, tho' our ac. was good at the banks. I do not remem-

33 ber exactly how the ac's stood; we did not have heavy balances. We had been dealing with Cole Brothers, or rather had been dealing thro' them. We had private obligations due them outside of our current business. We were indebted to them outside of our current business $1,000 at that time. We now owe them $4,000. We have become indebted to them $3,000 since the 31 August, 1867, by virtue of an endorsement maturing which they provided for. We owed them $1,000 cash, and they were on our paper for $3,000. I do not know the exact amount we received from Cole Brothers. I could tell by referring

to my books. I think there was a bill of exchange for $1,000 that went to protest, for reason satisfactory to ourselves, in August, tho' it may not have been in August; it was in July & August; it never has been paid by us; it was a bill drawn on us. The parties who drew the draft on us were in Cincinnati, and, at the maturity of the draft, held property of ours, & because they had dishonored a draft of ours we refused to pay theirs. The name of this firm is Harper, Bertrand & Co.

34 Our checks were not dishonored in August, I think. They may have been, but I do not know. The firm is indebted in the neighborhood of $60,000. I cannot tell the amount of our available assets. I think if I had the handling of our assets they would amount to more than $10,000. I cannot tell what they are worth now. I think I would make 50 per cent. on them. We filed our petition on 22nd Oct., 1867. Most of our indebtedness was contracted prior to the 31 August, 1868.

Ques. Were you not in an insolvent condition on the 31st August, 1867?

(Objected to as incompetent and irrelevant.)

Ans. We were hard pressed.

Ques. Could you then have paid all your debts?

(Objected to as incompetent and irrelevant.)

Ans. After-developments proved we could not have done so.

WILLIAM K. SHERWOOD.

35 *Deposition of Robert A. Betts, taken in St. Louis, Mo, before A. W. Mead, notary public, May* 3, 1869.

Robert A. Betts, being produced, sworn, and examined on the part of the plaintiffs, deposes and says:

I reside in St. Louis; am assistant cashier of the St. Louis National Bank. (Exhibit B shown witness.) Their draft was deposited by Cole Brothers at the said St. Louis National Bank for collection September 4, 1867. We sent it to New Orleans to our correspondent, the Citizens' Bank of Louisiana. On 28th of same month we received a letter from our correspondent advising us of the payment of the draft, and charged the bank at New Orleans—that is, the Citizens'—with the proceeds of it, and credited the same to Cole Bro's. Cole Bro's kept a banking ac. with us.

Cross-examined.

The draft was left for collection merely. It was not left until the 4th of September. We did not receive a letter advising us of the acceptance of the draft; it is not customary to so advise. If it is not accepted, we usually get a notice of protest for non-acceptance. Sherwood, Karns & Co. did not keep an account with us last year.

R. A. BETTS.

36 *Deposition of John L. Dunnica, taken on behalf of plaintiffs January 2nd, 1868, at New Orleans, La, before Kilian Loew, U. S. commissioner.*

I am a member of the firm of Hamilton & Dunnica, plaintiffs herein. Sherwood, Kearns & Co. shipped in St. Louis on or about the 31st August, 1867, 1,200 sacks of white & 50 sacks of yellow corn, on board steamboat Bee & barges, consigned to Hamilton & Dunnica, at New

Orleans. At the time of the shipment aforesaid Sherwood, Kearns & Co. drew their draft for $2,000, payable 20 days after date, dated St. Louis, 31 August, 1867, upon Hamilton & Dunnica, at New Orleans, against the aforesaid shipment of 1,250 sacks corn, annexed said draft to the bill of lading for the corn, & negotiated the draft at the same time through Cole Bro's, at St. Louis, our agents. This draft was sent by the St. Louis National Bank to the Citizens' Bank of La. for collection. The Citizens' Bank of La. presented said draft to Hamilton & Dunnica for acceptance, which was accepted, & paid by them at maturity. (The bill of lading & draft are here produced before the U. S. commissioner, who identifies the same with his marks as Ex-
37 hibits A & B.) This corn was never delivered to our house, although due demand was made for the same from the capt. of the Bee & the Mississippi Valley Transportation Company, of which co. I. T. Burdeau is the agent in this city. The Bee & barges arrived in New Orleans about 16 Sept., 1867. The master of the Bee assigned for reasons for non-delivering the corn, that the same had been taken from the boat at Cairo, by legal process issued at the instance of the defendants in this case. At the time the corn would have been ready for sale after its arrival in N. Orleans, it could have been sold at 1 30 for white, & 1 25 per bushel for yellow. At the time the boat should have delivered the corn, as per bill of lading, Sherwood, Kearns & Co., of St. Louis, were indebted to Hamilton & Dunnica nearly $10,000; this indebtedness has been since reduced to $7,624 02, as per acc't-current annexed & marked C.

The proceeds of the 1,250 sacks of corn would not nearly have paid the indebtedness from Sherwood, Kearns & Co. to our house, if they had been received.

JOHN L. DUNNICA.

38 *Deposition of George P. Harrison, taken on behalf of plaintiffs January 3rd, 1868, at New Orleans, La., before Kilian Loew, U. S. commissioner.*

And on the 3d day of Jan'y inst., there further appeared before me George P. Harrison, who, being duly sworn, says he is the confidential clerk & book-keeper of Messrs. Hamilton & Dunnica, & as such conversant with the business of the house. Upon hearing the evidence given by Mr. Dunnica read to him, he says that he fully corroborates the same, & adopts it as his own

G. P. HARRISON.

Exhibit "A."

Received, St. Louis, Aug. 31, 1867, from Sherwood, Kearns & Co., in apparent good order, on board the good steamboat Bee & barges, the following articles, marked as below, which are to be delivered without delay, in like order (the dangers of navigation, fire, explosion, and collision excepted) to Hamilton & Dunnica, at N. Orleans, on levee or wharf, he or they paying freight at the rate of annexed, or thirty-five cents p'r sacks,——and charges.

39	1st class, per 100 lbs	
	2d " " " "	
38	" " " "	
	4th " " " "	
	P'c'g freight	
	For the lot	

In witness whereof the master, clerk, or agent of said boat, has affirmed to—bills of lading, all of this date and tenor, one of which being accomplished the others stand void.

[Geo. H. Dewey & Co., Stationers.]

Marks.	Articles.	Gross weight.	1st class.	2d class.	3d class.	4th class.	Packages.
20, 305 Jay.	1,200 sacks white corn. 50 " yellow do.						

CHARLES SCUDDER, *Ag't.*

Exhibit A.

K. LOEW, *U. S. Com.*

(Indorsed:) B. L. 218. Per steamer Bee & barges, 1,250 sacks corn. Rec'd Septe'r, 1867. Ac. Sherwood, Kearns & Co.

A. Exhibit.

K. LEOW, *U. S. Com.*

Filed Sept. 12, 1'67.

40 *Exhibit "B."*

ST. LOUIS, *Aug.* 31, 1867.

Twenty days after date pay to the order of ourselves, with current rate of ex. on N. Y., twenty-five hundred dollars, value received, and charge the same to account of shipment 1,200 bags white corn, for Bee & barges, 50 bags yellow corn.

SHERWOOD, KEARNS & CO.

To Messrs. HAMILTON & DUNNICA,
New Orleans, La.

No. 793.

(Indorsed:) Hamilton & Co. Ex. 25,000. Sept. 23. Kerwood, Kearns & Co. Cole Brothers.

Pay J. L. Delay, esq., cashier, or order.

R. A. BETTS & CO.,
St. Louis Nat. Bank, St. Louis.

(Indorsed:) Hamilton & Dunnica. Pay to G. P. Harrison.

(Indorsed:) Paid.

K. LEOW, *U. S. Com'r.*

[5 int. rev. stamp.]

THE UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

41 I, John A. Jones, clerk of the circuit court of the United States for said southern district of Illinois, do hereby certify the foregoing is a true copy of a bill of lading & exchange, with endorsement, as the same was attached in the place now occupied by this copy,

attached in accordance with stipulation on file herein in the case in which the deposition to which is attached was taken.

In testimony whereof I have hereunto set my hand & affixed the seal of said court, at Springfield, in said district, this eighteenth day of March, A. D. 1868, and of our independence the ninety-second.

[L. S.] J. A. JONES, *Clerk.*

42 *Exhibit "C."*

Messrs. Sherwood, Karns & Co., in acc't with Hamilton & Dunnica.

		Interest.	Days.	
1867.				
Sept. 13.	To your d'ft on us (due & paid) Sept. 19	11 95	43	1,250 00
" "	" " do. " " " " " 23	16 64	39	1,920 00
" "	" " do. " " " " " 16	14 31	46	1,460 00
" "	" " do. " " " " " 20	7 69	42	825 00
" "	" " do. " " " " " 23	21 67	39	2,500 00
" 14.	" cash p'd ¼ % prem. of exchange on $14,000	08	48	7 00
" 18.	" do. p'd dispatch to Cole Bro's		44	2 80
" 19.	" do. p'd ¼ % prem. of exchange on $1,250	13	43	6 25
" 20.	" do. p'd ¼ % " " " " 825		42	4 13
" 23.	" do. p'd ¼ % " " " $1,920 & $2,500	10	39	11 05
Oct. 24.	" do. 2½ % commission for advancing $2,500, Sept. 23, to pay d'ft for same am't due that date			62 50
" "	" bal. of int. due us to Oct. 31st			49 79
		$72 57		$8,038 52
	CREDIT.			
1867.				
Sept'r 13.	By cash bal. bro't down to your cr., as per ac. rend'd	5 48	49	503 75
" 21.	" nett proceeds, 180 bbls. flour	10 72	41	1,176 04
" 25.	" " " 44 " do. Oct., 3d	1 63	29	232 91
" "	" " " 16 " do. " 6th	56	26	95 98
" "	" " " 54 " do. " 6th	1 86	26	322 64
" "	" " " 17 " do. " 3rd	14	29	145 73
" 30.	" " " 30 " do. " 10th	1 59	22	325 09
Oct. 24.	" bal. of interest carried to your debit	49 79		
" "	" bal. due us cash to Oct'r 31, carried down to your debit			5,216 38
		72 57		8,038 52
" 24.	To balance due us cash to Oct. 31, bro't down			5,216 38
	Add our s't-d'ft on you for Cole Bro's, June 14th, not p'd by you			2,395 00
	Interest on same to Oct. 31, 1867, 130 days			72 64
				$7,694 02

E. & O. E.
New Orleans, Oct. 24, 1867.
Exhibit C.

K. LOEW, *U. S. Com'r.*

43 And afterwards, to wit, on the eighteenth day of March, eighteen hundred and sixty-eight, a stipulation was filed in the words and figures following, to wit:

HAMILTON & DUNNICA
vs.
WILLIAM P. HALLIDAY ET AL.

In the circuit court of the United States for the southern district of Illinois.

It is agreed that defendants may cross-examine John L. Dunnica and

G. P. Harrison in reference to the matters about which they have deposed in chief in the above-entitled cause, before the same commissioner before whom their depositions-in-chief were taken, or before any other duly authorized officer, and that their depositions under such cross-examination may be taken ex parte under the act of Congress.

It is also agreed that the plaintiffs may withdraw from the deposition filed the bill of lading and attached draft or bill of exchange, leaving certified copies thereof, for the purpose of proving the execution thereof.

STUART, EDWARDS & BROWN, *for Pl'ff.*
PALMER & HAY, *for Def'ts.*

(Indorsed:) Filed March 18, 1868.

J. A. JONES, *Clerk.*

44 And said plaintiffs further read in evidence a copy of a record of the court of common pleas of the city of Cario, Illinois, in the words and figures following:

STATE OF ILLINOIS,
City of Cairo, Alexander County, ss:

Pleas before the honorable court of common pleas of the city of Cairo, held at the court-house in said city, on Tuesday, the eighteenth day of February, A. D. 1868, of the February term, A. D. 1868, of said court.

Present, the Hon. John H. Mulkey, presiding and holding said court; Alexander H. Irvin, clerk; John Hogan, city marshal.

Be it remembered that heretofore, to wit, on the fifth day of September, A. D. 1867, a precipe affidavit and cost bond was filed in the clerk's office of said court in the following styled cause; which are in the words and figures following, to wit:

WILLIAM P. HALLIDAY, EDWIN W. HALLIDAY, Henry L. Halliday, Thomas W. Halliday, and Rufus P. Robbins, firm of Halliday Brothers, *vs.* WILLIAM K. SHERWOOD AND RUFUS S. KARNS, firm of Sherwood, Karnes & Co.	Assumpsit.

45 "STATE OF ILLINOIS,
"*Alexander County, City of Cairo:*

"In the court of common pleas of the city of Cairo, to the November term, 1867.

"WILLIAM P. HALLIDAY, EDWIN W. HALLIDAY, Henry L. Halliday, Thomas W. Halliday, & Rufus P. Robbins, partners doing business under the firm name of Halliday Brothers, *vs.* WILLIAM K. SHERWOOD & RUFUS S. KARNES, partners doing business under the firm name of Sherwood, Karnes & Co.	Assumpsit; damages, $3,000.

"The clerk will please issue writs of attachment in the above-entitled cause, in pursuance of the affidavit hereto attached.

"GREEN & GILBERT,
"*Att'ys for Pl'ffs.*"

"Thomas W. Halliday, a member of said firm of Halliday Brothers, being duly sworn, deposes and says that the said Sherwood, Karnes & Co. are indebted to the said Halliday Brothers in the sum of about $3,000 for twelve hundred and fifty sacks of corn, containing about 2,800 bushels of corn, sold and delivered by said Halliday Brothers to
46 said Sherwood, Karns & Co., and that the said Sherwood, Karnes & Co. are not residents of the State of Illinois.

"THOMAS W. HALLIDAY.

"Sworn to & subscribed before me this 5th day of September, A. D. 1867.

[SEAL.] "H. H. CANDEE, *Notary Public.*

[U. S. stamp, 5c.]

"SAME
vs.
SAME.

"I hereby enter myself security for costs in this cause, & bind myself to pay, or cause to be paid, all costs that may accrue in this case to the defendants or any of the officers of this court, pursuant to the laws of this State.

"Dated Sept. 4, 1867.

"WILLIAM H. GREEN."

Whereupon there was also filed in the clerk's office of said court a bond in attachment; which is in the words and figures following, to wit:

"Know all men by these presents that we, Thomas W. Halliday, and George D. Williamson, and Samuel P. Halliday, are held and
47 firmly bound unto Sherwood, Karnes & Co. in the penal sum of six thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly, by these presents, sealed with our seals, and dated this 5th day of September, 1867.

"The condition of the above obligation is such, that whereas the above-bounden Thomas W. Halliday hath, on the day of the date hereof, prayed out of the court of common pleas of the city of Cairo an attachment at the suit of Halliday Brothers, and against the estate of the above-named Sherwood, Karnes & Co., for the sum of three thousand dollars, and the same being about to be sued out, returnable on the first day of the next term thereof, to be holden at the court-house in and for said city, on the third Monday in November next:

"Now, if the said Halliday Brothers shall prosecute their suit with effect, or, in case of a failure therein, shall well and truly pay and satisfy the said Sherwood, Karnes & Co. all such costs in said suit, and such damages as shall be awarded against the said Halliday Brothers, or their heirs, executors, or administrators, in any suit or suits which
48 may hereafter be brought for wrongfully suing out the attachment, then the above obligation to be null and void; otherwise to remain in full force and virtue.

"THOMAS W. HALLIDAY. [SEAL.]
"G. D. WILLIAMSON. [SEAL.]
"S. B. HALLIDAY. [SEAL.]

"Signed, sealed, and delivered in presence of—

"Approved Sept'r 5, '67.

"ALEX. H. IRVIN, *Clerk.*"

Whereupon there was issued out of the clerk's office of said court a writ of attachment; which is in the words & figures following, to wit:

"STATE OF ILLINOIS,
"*City of Cairo, County of Alexander, ss:*

"The people of the State of Illinois to the marshal of said city, greeting:

"Whereas Thomas W. Halliday, one of the firm of Halliday Brothers, composed of William P. Halliday, Edwin W. Halliday, Henry L. Halliday, Thomas W. Halliday, & Rufus P. Robbins, hath complained on oath to Alexander H. Irvin, clerk of the court of common pleas of the city of Cairo, Illinois, that William K. Sherwood & Rufus S. Karns,
49 partners doing business under the firm name of Sherwood, Karns & Co., are justly indebted to them, the said Halliday Brothers, composed as aforesaid, in the sum of three thousand dollars; and oath having been made that the said Sherwood, Karns & Co. are non-residents of the State of Illinois, and the said Thomas W. Halliday having given bond and security, according to the act in such cases made and provided:

"We therefore command you that you attach so much of the estate, real and personal, of the said Sherwood, Karns & Co., to be found in your city, as shall be of value sufficient to satisfy the said debt and costs, according to said complaint; and such estate so attached in your hands to secure, or so provide that the same may be liable to further proceedings thereupon, according to law, at a term of the court of common pleas of the city of Cairo, to be holden at Cairo, within and for the city of Cairo, on the 3rd Monday of November next, so as to compel the said Sherwood, Karns & Co. to appear and answer the complaint of the said Halliday Brothers. And we further command you that you summon the said William K. Sherwood and Rufus S. Karns, partners, &c.,
50 if they shall be found in your city, personally to be and appear before the court of common pleas of the city of Cairo, on the first day of the next term thereof, to be holden at the court-house in Cairo, in said county, on the 3rd Monday of November next, to answer unto Halliday Brothers in a plea of assumpsit to the damage of said plaintiffs, as is said, in the sum of three thousand dollars; and have you there this writ, with an endorsement thereon, in what manner you shall have executed the same.

"Witness Alexander H. Irvin, clerk of our said court and the seal thereof, at Cairo aforesaid, this fifth day of September, A. D. 1867.

[SEAL.] "ALEX. H. IRVIN, *Clerk.*"

Which said writ was by the said city marshal returned into the clerk's office of said court with the following endorsement thereon, to wit:

"STATE OF ILLINOIS,
"*Alexander County, City of Cairo, ss:*

"I, John Hogan, city marshal of the city of Cairo, Illinois, do hereby certify that, by virtue of the within writ of attachment, I have
51 attached twelve hundred and fifty sacks of corn as the property of the within-named defendants, Sherwood, Karns & Co., which said property is in my custody. The within-named defendants, Sherwood, Karns & Co., not found in my bailiwick this fifth day of September, A. D. 1867.

"JOHN HOGAN, *City Marshal.*"

And afterwards, to wit, on the seventh day of November, A. D. 1867, there was filed in the clerk's office of said court a declaration; which is in the words and figures following, to wit:

"In the court of common pleas of the city of Cairo, to the November term, 1867.

"STATE OF ILLINOIS, *City of Cairo, ss:*.

"William P. Halliday, Edwin M. Halliday, Henry L. Halliday, Thomas W. Halliday, & Rufus P. Robbins, partners doing business under the name & style of Halliday Brothers, pl'ffs, by Greene & Gilbert, their attorneys, complain of William K. Sherwood and Rufus S. Karnes, partners doing business under the name & style of Sherwood, Karns
52 & Co., def'ts, summoned, &c., of a plea of trespass on the case upon promises: For that whereas the said defendants, on the fourth day of September, in the year of our Lord one thousand eight hundred and sixty-seven, at, to wit, the said city of Cairo, were indebted to the said plaintiffs in the sum of three thousand dollars of lawful money of the United States of America, for divers goods, wares, and merchandise, to wit, 1,250 sacks of corn, by the said plaintiffs before that time sold and delivered to the said defendants, and at the special instance and request of the said defendants, and being so indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested. And whereas also the said defendants, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance
53 and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandises of the said plaintiffs, the said defendants then and there undertook, and faithfully promised the said plaintiffs that the said defendants should well and truly pay to the said plaintiffs so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof were reasonably worth, when the said defendants should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares, and merchandises last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of three thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas also the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, were indebted to the said plaintiffs in the further sum of $3,000 of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiffs to the said defendants,
54 and at the like request of the said defendants, and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants, and at the like request of the said defendants, and for other money by the said defendants before that time had and received to and for the use of the said plaintiffs; and being so indebted the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count men-

tioned, when the said defendants should be thereunto afterwards requested. And whereas also the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiffs in the further sum of
55 $3,000 of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested. Nevertheless the said defendants, although often requested, &c., have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same, or any part thereof, to the said plaintiffs the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiffs of three thousand dollars. And therefore the said plaintiffs bring suit, &c.

"GREEN & GILBERT,
"Att'ys for Pl'ffs."

56 *Copy of ac. sued on.*

"Sherwood, Karns & Co., to Halliday Brothers,	Dr.
"To 1,250 sacks of corn, containing 2,800 bushels of corn, sold & delivered	$3,000 00
"To reasonable worth of goods, wares, & merchandise, sold & delivered	3,000 00
"To money lent, advanced, p'd, & expended by pl'ffs for def'ts & other money had & rec'd by def'ts to pl'ffs' use.	3,000 00
"To money due on account stated	3,000 00"

And afterwards, to wit, on the nineteenth day of November, of the November term, A. D. 1867, of said court, the following proceedings were had and orders made and entered of record in said cause by said court, to wit:

"HALLIDAY BROTHERS
vs.
SHERWOOD, KARNS & Co. } Assumpsit.

"This cause is this day continued for service until court in course."

And now, to wit, at the time and place first herein aforesaid,
57 the following certificate of publication was filed in the clerk's office of said court; which is in the words and figures following, to wit:

"STATE OF ILLINOIS, *Alexander County, ss:*

"I, Louis Mathews, for the Cairo Democrat Company, publishers of the Daily and Weekly Democrat, a public newspaper printed in the State, county, and city aforesaid, do hereby certify that the annexed notice has been published in said newspaper four successive weeks,

the first publication being on the 22nd day of November, 1867, and the last publication being on the 12th day of December, 1867.

"LOUIS MATHEWS,
"*For Cairo Democrat Co.*

"Printers' fee, $10 00. Received payment.
"CAIRO DEMOCRAT CO.,
"Per MATHEWS."

Legal.

"In the court of common pleas of the city of Cairo, to the February term, A. D. 1868.

"STATE OF ILLINOIS, *City of Cairo, ss:*

58 "WILLIAM P. HALLIDAY, EDWIN W. Halliday, Henry L. Halliday, Thomas W. Halliday, and Rufus P. Robbins, partners doing business under the firm name of Halliday Brothers,
vs.
WILLIAM K. SHERWOOD AND RUFUS S. KARNS, partners doing business under the firm name of Sherwood, Karns & Co.
} In attachment. Demand, $3,000.

"Notice is hereby given to you, the said William K. Sherwood and Rufus S. Karns, partners doing business under the firm name of Sherwood, Karns & Co., that a writ of attachment has been sued out of the office of the clerk of the court of common pleas of the city of Cairo, at the suit of the said Halliday Brothers above named, and against the estate of you, the said Sherwood, Karns & Co., above named, for the sum of three thousand dollars, directed to the city marshal of said city to execute, which said writ has been returned by the city marshal executed by attaching twelve hundred and fifty sacks of corn as the property of the said defendants. Now, unless you, the said Sherwood,
59 Karns & Co., shall personally be and appear before said court of common pleas of the city of Cairo on the first day of the next term thereof, to be holden in the city of Cairo, and State of Illinois aforesaid, on the third Monday in the month of February, A. D. 1868, give special bail, and plead to said action, judgment will be entered against you in favor of the said plaintiffs, and the property attached sold to satisfy the same, with costs.

"Cairo, Ill's, November 22, 1867.

"ALEX. H. IRVIN, *Clerk.*

"GREEN & GILBERT, *Attorneys for Plaintiffs.*"

And thereupon the following further proceedings were had and order made and entered of record in said cause by said court, to wit:

"WILLIAM P. HALLIDAY, EDWIN W. HALLIDAY, Henry L. Halliday, Thomas W. Halliday, & Rufus P. Robbins, firm of Halliday Brothers,
vs.
WILLIAM K. SHERWOOD AND RUFUS S. KARNS, firm of Sherwood, Karns & Co.
} Assumpsit.

60 "This day came the plaintiffs, by Green & Gilbert, their attor-

neys, and the defendants being each three times solemnly called come not, but made default, and the court, after hearing the testimony, and being now fully advised in the premises, assesses the plaintiffs' damages at the sum of two thousand nine hundred and forty-one $\frac{79}{100}$ dollars. It is therefore considered by the court that the said plaintiffs have and recover of said defendants the aforesaid sum of two thousand and nine hundred and forty-one $\frac{79}{100}$ dollars, their damages so assessed as aforesaid, and also their cost, herein expended, at $\$$, and that in default of payment, special execution issue therefor, and that the property attached be sold."

And afterwards, to wit, on the sixteenth day of March, A. D. 1868, there was issued out of the clerk's office of said court a writ of special execution; which is in the words and figures following, to wit:

"STATE OF ILLINOIS,
"*City of Cairo, County of Alexander, ss:*

"The people of the State of Illinois to the city marshal of said city, greeting:

61 "Whereas, by our writ of attachment, we lately commanded you that you attach so much of the estate, real or personal, of William K. Sherwood and Rufus S. Karns, firm of Sherwood, Karns & Co., to be found in your city, as should be of value sufficient to satisfy a debt due William P. Halliday, Edwin W. Halliday, Henry L. Halliday, Thomas W. Halliday, & Rufus P. Robbins, firm of Halliday Brothers, of two thousand nine hundred & forty one $\frac{79}{100}$ dollars, besides interest, and the sum of twenty-nine dollars, [besides interest, and the sum of twenty-nine dollars,] costs of suit; and you having made return on that writ, that by virtue thereof you had attached twelve hundred and fifty sacks of corn, as the property of said defendants, and that said corn remained in your hands unsold: Now, therefore, you are hereby commanded that you sell, or cause to be sold, said corn by you in form aforesaid taken, without delay, and have you the money arising therefrom ready in ninety days to render to the said plaintiffs for damages, and interest, and costs, aforesaid; and have you then and there this writ, with any indorsements thereon as to the manner in which you shall have executed the same.

62 "Witness Alexander H. Irwin, clerk of our said court, & the seal thereof, at Cairo aforesaid, this 16th day of March, A. D. 1868.
[SEAL.] "ALEX. H. IRVIN, *Clerk.*"

And afterwards, to wit, on the twenty-seventh day of March, A. D. 1868, the said special execution was, by the said city marshal, returned into the clerk's office of said court, with the following indorsement thereon, to wit:

"This execution came to my hand the 17th day of March, 1868, at 9 o'clock a. m.

"JOHN HOGAN, *City Marshal.*

"By virtue of this special execution I have this day, March 27th, 1868, sold the within-described corn, 2,666^{19} bushels in pursuance of due & lawful notice given of the time & place of sale, and Charles T. Hinde having bid 85 c'ts per bushel, the said corn was struck off to him and he became the purchaser at and for the sum of two thousand

two hundred & sixty-six $\frac{26}{100}$ dollars, & has paid me said sum, which I have paid over to the plaintiffs, less the sum of $97 75 costs of suit, and $242 13 for storage.

"JOHN HOGAN,
"*City Marshal, City of Cairo,*
"By P. W. ALLENS, *Deputy.*

63 "$2,014 25. Received, Cairo, Ill's, March 27th, 1868, from John Hogan, marshal of city of Cairo, two thousand and fourteen & $\frac{25}{100}$ dollars, amount collected on execution in case of Halliday Brothers against Sherwood, Karns & Co.

"HALLIDAY BROTHERS."

STATE OF ILLINOIS,
City of Cairo, Alexander County, ss:

I, Alexander H. Irvin, clerk of the court of common pleas of the city of Cairo, hereby certify that the foregoing is a true, complete, & perfect transcript of the proceedings had, and orders made and entered of record, in said cause by said court, as copied by me from the records in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this ninth day of April, A. D. 1868.

[SEAL.] ALEX. H. IRVIN, *Clerk.*

[5 rev. stamp.]

And the foregoing was all the evidence offered on behalf of the plaintiffs in said cause. The plaintiffs also proved that they were part-
64 ners, as alleged in the declaration, and that the defendants in this suit were the plaintiffs in the attachment suit the record of which was introduced in evidence, and also that the receipt appearing in said record was executed by defendants.

Said defts then read in evidence the depositions of Nathan Cole, Rufus S. Karns, John N. Booth, Samuel Virden, Samuel Fenby, William C. Scott, William A. Ober, David Todd, and George H. Rea.

65 *Deposition of Nathan Cole, taken on behalf of defendants.*

Nathan Cole, being produced, sworn, and examined on the part of the defendants, deposes and says:

The style of our firm is Cole Bro's, composed of myself and Herman C. Cole—in August last. We took in Ezra B. Starkweather on the 1st January last. Bill of lading, Exhibit A, first came into the possession of Cole Bro's on the 31st August, 1867; we got it from Mr. Sherwood, of the firm of Sherwood, Karns & Co. I paid Sherwood proceeds of draft, "Exhibit A," which was attached to the bill of lading, amounting to $2,480. I paid Sherwood by our check upon either the National Bank of St. Louis or the St. Louis Building and Savings Association. I can produce the check. In due course of time I deposited the draft and bill of lading with the National Bank of St. Louis for collection.

I did not know where the corn was when I took the draft; I presumed the corn was on the barges, of course; I made no enquiry where the corn was, as I had a bill of lading for it in due form.

Question. Was it or not a custom to issue bills of lading at this
66 port before the receipt of goods?

(Objected to as irrelevant and incompetent.)

Ans. I have heard of its being done, I believe.

(Objected to as hearsay and opinion & incompetent.)

Ques. Was the issuing of bills of lading at this port by carriers before receipt of the goods a custom or an exception to a custom?

(Objected to as incompetent and irrelevant.)

Ans. When the boats had responsible orders for goods some of the lines would grant bills of lading on the orders.

Ques. Was this one of the lines in the habit of granting bills of lading or not on such orders?

(Objected to as irrelevant.

Ans. I do not know.

Ques. What lines do you refer to that did so grant bills on orders?

(Objected to as irrelevant.)

Ans. I cannot name any especial lines. I had not asked for boats to give bills of lading on orders for several years except in one case, and then it was refused.

Ques. Were you in the habit of taking bills of lading granted on orders?

Ans. Not when we were aware of them being so granted.

67 Ques. Was it or not in accordance with the custom of this port for carriers to issue bills of lading on orders, so far as your knowledge extends?

(Objected to as incompetent and irrelevant.)

Ans. I cannot answer, except as I have already answered.

Ques. Cannot you then say, so far as your knowledge goes, that there was no such custom?

(Objected to as incompetent and irrelevant.)

Ans. I cannot say; I cannot answer the question; I do not of my own knowledge know of such custom. I did not send any one to the boat or barges to see whether or not the corn was there. I supposed the Bee and barges were at the landing in St. Louis. I believed they were at the levee, but do not know where they were. Mr. Sherwood told me what he paid for the corn; he did not inform me from whom he puchased; he showed me no memorandum or bill of sale, simply the bill of lading and draft. Sherwood said, I think, he paid $1 07½ for the corn delivered on board.

Question. Did Sherwood inform you whether or not he had paid for the corn?

68 Answer. He did not.

Ques. What were the relations existing between you and Hamilton & Dunnica?

Ans. We advanced money upon property consigned to them, upon [upon] bills drawn against such property.

Ques. How did this corn become consigned to Hamilton & Dunnica?

Answer. Sherwood, Karns & Co. were in the habit of shipping to them and we were in the habit of taking their bills drawn this way.

Question. Did you know anything about the purchase of this corn, or about Sherwood, Karns & Co. intending to purchase it?

Ans. Mr. Sherwood may have asked me how much I would advance on corn before or after the purchase; I do not know which; most likely before, as parties were in the habit of making arrangements for money before buying.

Question. Had Sherwood, Karns & Co. made many such shipments during the summer of eighteen hundred and sixty-seven?

Answer. They shipped every few days. We were advancing every

few days on bills drawn on such shipments. Sherwood, Karns &
69 Co. were to pay a commission of 2½ % to Hamilton & Dunnica at New Orleans. We had reciprocal relations with Hamilton & Dunnica; we divided commissions at this end, that is at St. Louis, and they divided commissions at New Orleans. We did not divide commissions with Sherwood, Karns & Co. We were agents of Hamilton & Dunnica at St. Louis, and were so advertised. We were not advertised as their agents literally, but were advertised to make advances on shipments made to them. Hamilton & Dunnica were commission merchants also. The margin reserved on the draft was from thirty to fifty cents on the bag. At the time the draft was discounted, I had a general idea what corn was worth in New Orleans. It was higher priced in New Orleans than in St. Louis at the time of said sale. I cannot say whether it was higher after deducting freights and expenses. I believed at the time that there was a margin over. Cole Bro's made this advance under the general arrangements to get business for Hamilton & Dunnica. Hamilton & Dunnica paid this draft in full. After this thing transpired, as a matter of favor to Hamilton & Dunnica, I volun-
70 tarily offered to pay ½ of any loss that might accrue from it. We had no previous arrangements as to losses. The met losses other than this.

Ques. Have you the letter from Hamilton & Dunnica, informing you of the payment of this draft?

Ans. I have. I think their business went thro' the bank.

Ques. At the time this draft was negotiated, did you know the house of Halliday Bro's?

Ans. I knew there was such a house.

Ques. Did you know at the time who the corn was bought of?

Ans. I did not; tho' Mr. Sherwood may have told me. I do not know as to the other shipments, where the merchandise was; we advanced on bills of lading without enquiring where the property was. I had known the firm of Sherwood, Karns & Co. for several years; about 4, 5, or 6 years. They owed us nothing that was due at the time of the negotiation of this bill. The firm owed us nothing privately. We hold their note for $1,000, which matured afterwards, and we were endorsers for them $3,000, which also matured afterwards. The note was
71 for money loaned. The $1,000 was loaned for one year on the previous January. He stated to me what the money was for.

Ques. What did he state?

(Objected to as irrelevant.)

Ans. He stated that he wanted it in his business.

Ques. Was his business self-supporting at that time?

(Objected to as irrelevant.)

Ans. It was during the suspension of navigation, and they were doing very little.

Ques. Were their expenditures greater than their income?

(Objected to as irrelevant.)

Ans. It is quite likely at that time all such houses would spend more than their income.

Ques. Were they in embarrassed circumstances at that time?

Ans. They were.

Ques. Did they provide an endorser on that note?

Ans. They did not.

Ques. Was the loan of $1,000 an act of friendship or an investment?

Ans. An act of friendship. We were also on their paper for
72 $3,000; we were not secured at all. That endorsement was given

to them on account of their shipments to Hamilton & Dunnica, and in consideration that they should ship to them, (Hamilton & Dunnica.) I believe the Pacific Ins. Co. held the note indorsed by us for $3,000. It was not due at the time the draft was negotiable; the $3,000 note had been renewed. The renewals had been made at the request of the makers, Sherwood, Karns & Co. Sherwood, Karns & Co. appeared to be doing well after navigation opened in 1867; I thought they were. When they obtained the last renewal of the $3,000 note, I think they met with some losses.

Ques. At the time of the last renewal, was their embarrassments increasing or decreasing?

(Objected to as irrelevant and incompetent.)

Ans. I think they had lost money; considerable for men of their means. I did not know what the amount of their indebtedness was at the time the draft was negotiated.

Ques. Can you mention any large sum of money which they owed to anybody else at the time the draft was negotiated?

(Objected to as irrelevant and incompetent.)

73 Ans. I knew of several of their friends who had endorsed for them to the extent of $1,000 apiece.

Ques. With which one of this firm was you most intimate?

Ans. With Mr. Sherwood.

Ques. Had he conferred with you about his embarrassments?

Ans. He told me he was pretty hard run, and was trying to make arrangements with some New York parties, and seemed to have some hopes in that direction.

(Objected to as hearsay and incompetent.)

Ques. Were those conferences confidential?

(Objected to as irrelevant.)

Ans. They were like any conferences of that kind; they were made in my office. They were generally understood to be pretty hard run.

Ques. Had you been in the habit of advancing on bills of lading?

Ans. We had; they were generally considered to be men of small means.

Ques. Did they have any capital?

Ans. I cannot say; I could not say what their assets were.

Cross-examination by G. P. Strong, esq., counsel for plaintiffs.

Question. You were asked regarding to the custom of giving bills

74 of lading on orders; were you in the habit of negotiating or buying bills drawn upon shipments of produce which were not actually shipped?

Ans. I was not.

Ques. Was draft "Exhibit B" bought of Sherwood in the usual course of business?

Ans. It was.

Ques. Did you understand or suppose at the time that Sherwood, Karns & Co. were the owners of the corn, and that the corn was actually shipped on the Bee and barges at the time?

(Obj'd to as irrelevant.)

Ans. We took these papers upon the usual faith of such documents. I supposed from these papers that Sherwood, Karns & Co. had control of the property, and that the corn was on board the barges. Sherwood informed me he had bought the corn.

Ques. You have stated in your direct examination that Mr. Sherwood

may have told you of whom the corn was bought; have you any recollection of his doing so?

Ans. I have no such recollection, and upon reflection I don't think he did.

75 Ques. Is it customary for commission merchants to make advances upon, or to buy, bills of exchange drawn upon bills of lading or shipments of produce made as this one was?

Ans. I think it is.

Ques. Is it not a matter of every-day occurrence?

Ans. We had the money and bought this bill, instead of going to a bank and negotiating it as it is customary to do.

Ques. Then it is customary for the banks to negotiate such drafts?

Ans. It is.

Ques. You have stated that you were agents of Hamilton & Dunnica; what did you mean by that term?

(Objected to as a term well known & requiring no explanation.)

Ans. We solicited business for them here, and they reciprocated the favor in New Orleans towards us; and, as I have stated, the commissions on the business (that is the business sent) were mutually divided between us.

Ques. Then if you sent more business to them than they did to you, their commissions would exceed yours, and they would be compelled to pay you or refund a part of the surplus; on the other hand, if they

76 sent none to you, you would have to refund?

(Objected to as irrelevant.)

Ans. Yes; that is so.

Ques. Were such arrangements between commission-houses here and New Orleans common?

Ans. I presume they were.

Ques. Whose money did you make advances with in buying drafts on shipments, or making advances on shipments, to Hamilton & Dunnica?

Ans. With our own money.

Ques. Had you any authority to use the name of Hamilton & Dunnica, or to sign their name as their agents?

Ans. Our authority was confined simply to soliciting shipments, and making advances thereupon.

Ques. Had you any of their funds to make advances with; had you any authority to make advances for them out of their funds?

Ans. On two occasions I recollect of having a balance or balances in their favor which they requested us to advance upon shipments, if they could be had, or to remit them in current account. On one occasion we made advances out of such funds; this was in the spring of 1866.

77 Ques. Was this a part of their regular business with you, or was it for the purpose of remitting that balance?

(Objected to as irrelevant.)

Ans. It was for the purpose of remitting.

Ques. Was you in any other sense their agents than as consignors, endeavoring to throw as much business in their hands as you could, or as consignees of whatever they might send, or induce others to send, to you for sale?

(Objected to as irrelevant.)

Ans. That is precisely the sort of agency which we undertook.

Ques. Did you ever make advances, so far as you can recollect, upon shipments of produce that you knew were not on board according to the tenor of the bill of lading?

(Objected to as irrelevant.)

Ans. I never did.

Ques. Did you know what was to be done with the surplus or overplus of this corn, if there should be any margin?

Ans. Yes; it would have gone to the credit of Sherwood, Karns & Co., with Hamilton & Dunnica.

Re-direct examination.

When you advanced, was your advance ever returned before sale of the property sent down?

78 Ans. It never was, except the cases when I had money of theirs in my hands. In other cases we waited until sale of produce. I do not mean by this when we bought drafts. The advance which we waited for was when we advanced on open accounts. When we bought drafts Hamilton and Dunnica paid the drafts when they matured, without regard to the sale of the property.

Ques. Did the payment of these drafts enter into their accounts rendered to you?

Ans. No, they did not; they went into the parties' accounts who drew the drafts, and not into ours.

Ques. Did you get any commissions on these drafts purchased by you, or was there any commissions charged?

Ans. We got on the drafts purchased by us simply rate of exchange and interest. I have seen Sherwood, Karns & Co.'s account with Hamilton & Dunnica, and there was a charge for accepting and paying this draft, the charge was 2½ %. Cole Bro's did not get ½ of the 2½ % commission for acceptance & payment.

Ques. In your course of business with Hamilton and Dunnica, in which you shared commissions, did you usually obtain a share
79 of the commission or charge for such acceptance?

Ans. We did not; our only share of commissions was on purchases and sales.

NATHAN COLE.

Deposition of Rufus S. Karns, taken on behalf of defendants, May 9th, 1868, at St. Louis, Mo., before A. W. Mead, notary public.

80 Rufus S. Karns, of lawful age, being produced, sworn, and examined on part of defendants, says:

I was a member of the firm of Sherwood, Karns & Co. I had something to do with the property mentioned in Exhibit A. I cannot say positively whether I or Mr. Sherwood bought the corn from Mr. Booth; we both talked to him about it. We may have asked Mr. Cole how much he would advance on the corn to be shipped to Hamilton & Dunnica. We knew from what Mr. Booth told us that the corn was at a landing below; I believe at Price's Landing. We had bought before corn at landings below, but do not know whether we purchased any at Price's Landing. We did not pay Booth for the corn. I knew where the Bee and barges were when we got the bill of lading; they were at the landing in St. Louis. I do not know where the bill was signed; either on 'change, at the transportation office, or at our office. The bill of lading was signed the same day we got the order for the corn. We had been in the habit of consigning to Hamilton & Dunnica produce and flour, to be sold on our account, for, I should think, two years at least, perhaps longer. We owed Hamilton & Dunnica at the
81 time of this shipment, tho' our ac. was still open. I cannot tell how much we owed them.

Ques. How much, to your belief, did you owe them?

Ans. I think about $3,000, though I am not certain. There were consignments in the hands of Hamilton & Dunnica unsold at that time, and I think that the property depreciated in value before it was sold. I do not remember of telegraphing to them of this consignment. We have telegraphed them, but it was not our habit. We may have done it in this case.

Ques. What is your indebtedness to them now?

(Objected to as irrelevant.)

Ans. I do not know. I think something over $3,000. This is mere guess-work, however.

Ques. How much did your firm owe Mess. Coles on the 31st August, 1867?

Ans. We owed nothing which was due. They loaned us $1,000, for which they had our note, and were endorsers for us for $3,000, neither of which were due.

Ques. How much did they pay you on your draft?

Ans. They paid us the face of the draft less $20 discount.

Ques. What did you do with that money?

(Objected to as irrelevant.)

82 Ans. We deposited it at either in the 2nd or 3 National Banks of St. Louis.

Ques. Did you transmit any of it to Hamilton & Dunnica?

Ans. We did not.

Ques. Did you send them any money after the 31 August, 1867?

Ans. None, to my knowledge.

Ques. Was not your firm greatly embarrassed at that time?

(Objected to as incompetent and irrelevant.)

Ans. Yes; we needed more money than we had.

Ques. Had your checks been dishonored previous to 31 August, 1867?

(Objected to as incompetent and irrelevant.)

Ans. I think not.

Ques. When did your firm close business?

Ans. On the 5th September, 1867.

Ques. Did you pay anything on the 4th Sept'r?

(Objected to as irrelevant.)

Ans. We did.

Ques. Did you also fail to pay on that day?

Ans. We may have asked parties to wait for us who asked money on that day.

Ques. Why did you ask them to wait on you?

Ans. I won't be positive we did ask them. Our firm is in bankruptcy now.

Ques. When were the majority of the debts contracted by you which broke your firm?

(Objected to as irrelevant.)

83 Ans. Before the 31 August, 1867.

Ques. Was your firm insolvent on the 31 August, 1867?

(Objected to as irrelevant.)

Ans. We did not think so at the time, but future developments proved it to be so. I am well acquainted with Mr. Cole; have known him for 5 or 6 years.

Ques. Had your firm any business arrangement with Cole Bro's?

Ans. No. They sometimes bought our bills drawn on flour and produce shipped to Hamilton & Dunnica. They were not bound to do so any more than any banking-house. If the drafts suited them they

bought them. Most of our drafts on Hamilton & Dunnica were negotiated through Cole Bro's. We have negotiated drafts on Hamilton & Dunnica with other parties.

Ques. Was Nathan Cole acquainted with your house and its general condition?

(Objected to as irrelevant.)

Ans. We often advised with Mr. Cole on business matters. Mr. Sherwood was always the spokesman, and I cannot tell how much he knew. He knew the condition of our affairs, I suppose, as well as any man in the city.

84 Ques. Were his relations with your house of a friendly and confidential nature?

(Objected to as irrelevant.)

Ans. He was friendly to our house. To some extent they were of a confidential character.

Ques. Had he been informed of your embarrassments and necessity for money?

(Objected to as irrelevant.)

Ans. He had, early in year 1867; which was the reason of his having loaned us the money before spoken of.

Ques. After the negotiation of this draft, do you remember a conversation with Jno. N. Booth, concerning your condition and the relation Mr. Cole bore to your house as a creditor?

(Objected to as irrelevant.)

Ans. I do not. I may have had such a conversation, but I do not remember it.

Ques. Do you remember trying to pacify Booth by intimating that Cole Bro's had lost a great deal more?

(Objected to as irrelevant.)

Ans. No, sir, I don't, emphatically.

Ques. Were your checks dishonored on the 1st, 2d, or 3d Sept., '67?

(Objected to as irrelevant.)

Ans. I do not remember, but think not.

Ques. What was the amount of your indebtedness on the 31st August, 1867?

(Objected to as irrelevant.)

85 Ans. I cannot tell. I expect we owed from 30 to $40,000, but this is mere guesswork.

(Plaintiffs' counsel objects to guessing at answers.

Defendants' counsel asks the witness to refresh his memory, and give the amount hereafter.)

Ques. Were you present when the bill of lading was handed to Cole Bro's?

Ans. I have no recollection of the handing of this bill of lading; sometimes Mr. Sherwood went and sometimes I went to Cole Bro's.

Ques. Do you remember furnishing Cole Bro's with information regarding quality and price of the corn?

Ans. Cole Bro's were in the habit of inquiring about such things. It was represented to me as being choice corn in new reserved gunnies.

Ques. Were Cole Bro's informed where it was raised?

Ans. I do not know that they were; I don't know that they asked any questions about it, or about where it was. I don't know that they knew where it was.

Ques. Did you show Cole Bro's the order for the corn?

Ans. I did not.

Ques. Did Mr. Sherwood?

Ans. I do not know.

86 Ques. Were you present when the bill of lading was signed?

Ans. I do not remember.

Cross-examination by G. P. Strong, esq.

In buying this corn of Mr. Booth, Mr. Scudder brought Mr. Booth to us, saying that they had a lot of corn at a landing below, and that if we would buy the corn the transportation company would take it at the same time, as they had some corn there themselves. I cannot remember positively at what price the corn was first offered at; I only remember we bought it at less than the first offer, and bought it because the buyer offered to take it at a lower rate of freight than the packets would.

Ques. You have stated that you may have asked Cole Bro's what they would advance on the corn; have you any recollection of doing so, or saying to them anything about it until after you purchased the corn?

Ans. I have no distinct recollection whether I did or not. I did not know, neither did I suppose, we were insolvent when we bought this corn.

Ques. Could Mr. Cole have known any such thing?

(Objected to as irrelevant.)

87 Ans. He could not. On the 31 August, 1867, we were going on and doing business as usual. After business opened in the spring of 1867, our business was better than the year before; the business was encouraging, we thought we could work through. The purchase of corn and draft was drawn in the usual course of business, as done by merchants. The embarrassments of our house, of which Mr. Cole was informed, were those which occurred in the winter of 1867, growing out of the business of 1866.

Question. You have spoken of the confidential relations of your firm with Mr. Cole; were they any more than the relations of a personal friend anxious to see you succeed?

Ans. They were not, so far as I know.

Ques. Did Mr. Cole ever examine your books, or look into the state of your affairs?

Ans. He never examined our books, to my knowledge.

Ques. Was it usual to receive bills of lading at St. Louis before produce was actually on board boats or barges?

Ans. As far as I know, the giving of bills of lading in advance of produce delivered was an exception to the general rule, tho' we have received many such bills in advance.

Ques. Have you often received bills of lading when the produce was at ports on the river below St. Louis on orders of responsible parties?

88 Ans. We have.

(The above question and answer objected to as not proving a custom.)

Ques. What became of this corn which was shipped on the Bee and barges?

Ans. I do not know, except from hearsay. I have heard from the barge company & Mr. Booth that Halliday Bro's had taken the corn from the boat under attachment.

(Def'ts' counsel objects to hearsay testimony.)

Ques. What was this corn worth at New Orleans at the time it should have arrived there?

Ans. I cannot answer exactly. I remember when we purchased the

corn we figured that there was a margin of 8 to 12 cents per bushel over freight and expenses.

Ques. How many bushels of corn was there?

Ans. I cannot remember. There was 1,250 sacks, and the usual average is 2¼ bushels to the sack. Exhibit A is the bill of lading under which the corn was shipped. Exhibit B is the draft negotiated by Bro's, which accompanied and was attached to the bill of lading.

Ques. What were Hamilton & Dunnica to do with the surplus, if

Ans. They were to place it to our credit on account. There
understanding between us, Sherwood, Karns & Co., & Ha
89 & Dunnica, that any margin arising from sale of produ
signed by us to them should be credited to our indebtedness
them. This shipment was made like all other shipments to them, and was made after that understanding. That understanding applied to all shipments made by us to them.

Examination re-direct.

Ques. What was the freight per sack?

Ans. 35 cents per sack.

Ques. What was the insurance?

Ans. 1 cent per dollar.

Ques. What is the price of weighing?

Ans. 1½ cents per 100 lbs. We did not have to pay for weighing.

Ques. What were the quotations of the New Orleans market on the 31 August, 1867?

Ans. I knew then, but do not remember now.

Ques. What were the commissions at New Orleans?

Ans. 2½%.

Ques. Can you give us an estimate of your purchases for the week ending 31 August, 1867?

Ans. I could by referring to my vouchers.

Ques. Was not your purchases for said week in the neighborhood of $19,000?

(Objected to as irrelevant & not growing out of the cross-examination.)

Ans. I do not know.

90 Ques. Do you remember buying 188 barrels of flour of Morris, Peters & Co. for $1,420, on the 29 August, 1867?

(Same objection made by pl'ffs' counsel.)

Ans. I remember that we bought flour of those parties, but cannot remember the amount. I think it was about 188 barrels; the amount remains unpaid.

Ques. Will you make out a memorandum of your purchases for the week ending 31 August, 1867, which remain unpaid, for the purpose of being attached to your deposition?

(Objected to as irrelevant & not growing out of the cross-examination.)

Ans. I will, if I can find my vouchers, which I gave to my assignee in bankruptcy.

Re-cross-examination.

Ques. Did Cole Bro's know, or did either of them know, what purchases you made or were making for the week ending 31 August, 1867?

Ans. I don't know that they knew of any of our purchases excepting the purchase of corn for which they bought the draft.

R. S. KARNS.

Mr. Rufus S. Karns, on the same day, produces paper marked "Exhibit C," and hereunto annexed, and says this paper is a memo-
91 randum of the purchases of Sherwood, Karns & Co. for the week[ing] ending August 31, 1867, which remain unpaid.

R. S. KARNS.

Deposition of John N. Booth, taken on behalf of defendants, May 11th, 1868, at St. Louis, Mo., before A. W. Mead, notary public.

John N. Booth, of lawful age, being produced, sworn, & exam-
92 ined on the part of the defendants, deposes and says:

I reside in St. Louis; am 33 years of age; am a commission merchant in the firm of J. W. Booth & Sons. The members of the firm are John N., James W., & Thomas Booth. Am acquainted with Sherwood, Karns & Co.

Ques. Did you negotiate for the sale of some corn to them on 31 August, 1867?

Ans. I did.

Ques. State the particulars of the sale & negotiations.

(Objected to as irrelevant.)

Ans. On 28 Aug't, 1867, we received a despatch from Halliday Bro's, of Cairo, to offer 700 bags choice white corn, 500 sacks prime white, and 50 sacks choice yellow corn. We offered it from day to day until August 31, when we were ordered to sell. During "'change" hours of that day I enquired of Cha's Scudder, agent Mississippi Valley Transportation Company, the rate of freight on New Orleans. He asked me if I had any corn to ship. I told him we did not, but we had 1,250 sacks at Price's Landing, which we wished to sell, and wished to know if freight would be taken from that point at less rate than from St. Louis. My impression is he said the rates would be the same. He appeared very anxious to get the freight, and said Sherwood, Karns & Co. would, he thought, buy the corn. He walked with me to the flour table,
93 where we met Sherwood, and perhaps Karns. I stated to Sherwood that I understood he wished to buy corn, showing him the despatch authorizing us to sell it, informing him where the corn was; and I readily effected a sale at $1 07 per bushel. I then gave the order for the corn to Scudder, or to them, but I think they requested me to give the order to Scudder.

Ques. What price was the corn offered?

Ans. I am almost positive they gave me the price I asked. I do not think I asked more than $1 07 on the day of the sale. I am not altogether positive as to this, tho' my impressions are as stated.

Ques. Were any objections made to the price by them?

Ans. I think not.

Ques. Was the sale readily effected?

Ans. It was.

Ques. Was anything said about the corn?

Ans. I guaranteed the corn as represented.

Ques. Were any samples shown?

Ans. No.

Ques. Was anything paid for the corn?

Ans. No.

Ques. What were the terms of the order?

Ans. We had given several orders before, and I think the order stated,
"Halliday Bro's, agents, Price's Landing, Mo., deliver to Missis-
94 sippi Valley Transportation Company, or to Sherwood, Karns &
Co.'s order, (I cannot remember which,) 1,250 sacks corn," & describing the 3 qualities of corn.

Ques. When was the money to be paid?

Ans. It was a cash sale. I understood when the corn was delivered, & we got the weights, we were to get the money. There was nothing said about it, and when produce is sold on 'change and no terms of payment mentioned, it is generally understood to be a cash sale; it is always so understood.

Ques. Did Sherwood know where the corn was?

Ans. Yes. The order stated where it was; it stated it was at Price's Landing. I did not know that day that a bill of lading had been given on the basis of that order. I was not aware that the sale contemplated such a thing. I had nothing to do with the bill of lading.

Ques. What is the custom at this port about giving bills of lading on orders, instead of the property itself?

Ans. At that time I was not aware that it was ever done. I afterwards learned that occasionally transportation companies sometimes did give bills of lading previous to receiving the produce, but do not believe that it ever was customary.

Ques. Had you ever previously given orders for corn at Price's
95 Landing?

Ans. Yes; I never knew of bills of lading being given on these previous orders, and am satisfied there was none issued. I never gave any other order to Sherwood, Karns & Co. I think in one or two instances previous orders had been received by the Mississippi Valley Transportation Company. They issued their bills of lading on these previous orders, as I have been informed by the parties, after the receipt of the property. The order was given so they, Sherwood, Karns & Co., might obtain the corn. The corn was sold at the full market price; several cents per bushel more than any one else would offer. I enquired the rate of freight, to assist me in selling. I did not know whether the transportation company would land there, it being an out-of-the-way place. Mr. Scudder was present at the sale. The order for delivery was handed over as soon as the sale was affected; my impression is Mr. Sherwood asked me to hand to Mr. Scudder an order for the corn. The boat was going to leave that evening. The Bee & barges, I took for granted, were at the landing in St. Louis at the time of the sale. I did not at that time know anything of their financial condition. I knew they were buying pretty freely, and I supposed they were
96 all right. This corn belonged to Halliday Bro's, at Cairo. I have been in the commission business upwards of 12 years in this city. I first heard of the failing condition of Sherwood, Karns & Co. September 4, 1867, and I believe it was so generally understood in the city. Among business men it was considered a pretty large failure. I first ascertained that a bill of lading was issued and negotiated on the 2d or 3d September, 1867; Mr. Scudder so informed me, and I was much surprised that he did so; and taking in connection the readiness with which the corn was purchased with this information, caused me to feel uneasy. I, on the 4th, telegraphed to Halliday Bro's to stop the delivery of that corn. I made efforts to get the money for the corn. I presented a bill on the 4th, and was satisfied they were broke, and would have attached if I could find any property to attach. I felt satisfied on

the 4th September that Sherwood, Karns & Co. had been broke some time, from the information I then received.

(Plaintiffs' counsel objects to all the foregoing testimony of Mr. Booth as irrelevant and incompetent, and much of it hearsay. By consent the objection is written here instead of to each question.

A. W. MEAD, *Notary Public.*)

97 *Cross-examination.*

I had the corn on sale from the 28th August, 1867, when it was first offered "on 'change" at $1 10.

Ques. Did you not have a conversation with Sherwood or Karns a day or two before the sale?

Ans. I did not; I did not know they were buyers of corn until Scudder informed on the day of sale.

Ques. Are you certain that you did not on that day or the day before offer them the corn at a larger figure?

Ans. I am certain I did not on the day before, and I think I did not on that day. I think I showed them a despatch from Halliday Bro's authorizing me to sell at $1 07. In reference to their taking corn at the price asked, I could not swear point-blank, but such has been my impression. I telegraphed to Halliday & Bro's every day, and told them I might get $1 07.

Ques. Is not corn at a landing below town worth more than in town on account of there being no expense for drayage?

Ans. At that time I believe I could have obtained that much, if not more, here, because there was a big southern demand, while the New Orleans market was declining and few shippers buying.

98 Ques. Was not corn from that section of better quality than the general grade of corn?

Ans. It has a good reputation, but no better than Mo. River corn, Pacific railroad corn, or North Missouri railroad corn.

Ques. In making this sale, did not you argue with Sherwood that there was a margin of 8 to 10 cents on New Orleans quotations?

Ans. I don't think I did; there was less conversation about that trade than is usual.

Ques. Did not Scudder, in your presence, use such an argument, or some argument, to induce Sherwood to buy?

Ans. Not that I remember.

Ques. You knew this corn was to be shipped immediately?

Ans. I understood that the Bee & barges was to leave that evening. In three instances when I gave orders, I know the parties did not receive their bills of lading until the boats got the property.

Ques. Were Sherwood, Karns & Co. doing business at the time of the sale?

Ans. I knew nothing about their business unusual, excepting that it is not customary for commission-houses to speculate on their own account to the extent they were doing; but they do it sometimes. Sher-

99 wood, Karns & Co., I thought, were apparently in good credit on the 31 August, 1867, but I afterwards learned that some parties would not sell to them on that day. I made no demand of payment for this corn until the 4th September, 1867; I did not suppose they had received it until that time. Saturday I made the sale, and Monday or Tuesday I learned of their having received a bill of lading; this was the 2nd or 3d September. I took no steps until the 4th September to

stop the delivery of the corn. It is quite usual for parties to draw on shipments on bills of lading. There is nothing to attract a person's attention about negotiating a loan on a draft drawn on a bill of lading.

Ques. Do you know what became of this corn?

Ans. Of my own knowledge, I do not.

Ques. Do you know what became of it from what the defendants or their agents told you?

(Objected to as irrelevant.)

Ans. They told me that the corn was attached; my impression was from what they told me that they attached the corn; that was my understanding, and I have no doubt they got the corn.

Ques. Did you ever receive anything in part payment of this corn?

Ans. On the 5th Sept., 1867, Sherwood, Karns & Co. gave me
100 for collection 6 drafts or orders, dated the day previous, drawn on various persons at various places, addressed as follows: "Will please pay to J. W. Booth & Sons, or order, any balance there may be due us on your hands after closing our account," for which orders I gave no receipt. On 3 of the orders we obtained in all $99 95. Their whole bill amounted to $2,844 19; that is, Sherwood, Karns & Co.'s bill for the corn.

Ques. Do J. W. Booth & Sons expect to make good any loss, or any portion of the loss, in the event Halliday Bro's loose this corn?

(Obj'd to as irrelevant.)

Ans. In the event of a loss it will be amicably adjusted. They have made no claim or demand against J. W. Booth & Sons for any portion of this loss. There has been nothing said about it. What I mean by amicably adjusted is, that if they claim any such portion of the loss we will make the matter satisfactory to them. The sale was not guaranteed.

JOHN N. BOOTH.

101 *Deposition of Samuel Virden, taken on behalf of defendants, May 11th, 1868, at St. Louis, Mo.*

Samuel Virden, of lawful age, being produced, sworn, and examined on the part of the defendants, deposes & says:

I have been in the commission business in St. Louis since the spring of 1859. The name of my firm is Whittaker, Virden & Gray. The date of our last sale to Sherwood, Karns & Co. was on the 24 August, 1867. We sold 50 barrels of flour, at $7 50 per barrel. The debt is not paid yet.

(All objections as to relevancy and competency are, by consent of counsel, renewed as tho' taken after each question and answer.

A. W. MEAD, *N. P.*)

Ques. Is there any custom in this port of issuing bills of lading for property upon simple orders before the receipt of the property by carriers?

Ans. None that I know of. I have heard of instances of that kind, but there is no such custom.

SAM'L VIRDEN.

102 *Deposition of Samuel Fenby, taken on behalf of defendants.*

Samuel Fenby, of lawful age, being produced, sworn, & examined on the part of the defendants, deposes and says:

Am a grain and produce merchant in St. Louis, and have been so

engaged for the past ten years. Am acquainted with the firm of J. W. Booth & Sons. I purchased from J. W. Booth & Sons 1,000 sacks of corn, at Price's Landing, on the 10th August, 1867. There was an order for the delivery of that corn given to me. The corn was sent to New Orleans by the Atlantic Steamship Line, I think. I obtained the bill of lading several days after we delivered the order to the captain of the steamer, about the 14th August, 1867. There was no bill of lading until the corn was shipped. The captain made the bill of lading and forwarded it to us after receiving the corn.

Ques. Is there any custom at this port, among carriers, of issuing bills of lading based on orders for property at other ports than St. Louis, and before the receipt of the property?

Ans. I do not know of any. I never received bills of lading
103 based on such orders. I have received bills of lading where the carriers could go & count & see the property; for instance, if the property was at one end of the levee in St. Louis, & the boat at the other; but when they did so they took charge of the property. I have done considerable shipping. During the early part of August, up to the 20th, corn was dull in New Orleans and would not pay shipping. It was dull on the 31st; I think the quotations were $1 20 per bushel to $1 25. Taking the price of corn at this market August 31, '67, it would not pay to ship to New Orleans.

Cross-examination.

I presume corn was being shipped to New Orleans every day in August. Mr. Booth & Sons offered me this lot of corn for two or three days. I declined to buy it, and thought they had made a very good sale to Sherwood, Karns & Co. I forget the price they offered it at.

Ques. Was it not a frequent occurrence for transportation companies to issue bills of lading on 'change before they got the property?

Ans. Not to my knowledge. I never knew it to be done.

Ques. Have not you learned within the last year that this practice was quite common during 1867?

Ans. Only heard of it, or knew of it, at the time of the failure
104 of Lamb & Quinlin, which occurred last year. It is quite common for bills of exchange, predicated upon bills of lading, to be bought by parties and banks. It is of daily occurrence. A party having such a bill of lading, with draft attached, would presume the stuff to be on board.

SAM'L FENBY.

Deposition of William C. Scott, taken on behalf of defendants, May 11th, 1868, at St. Louis, Mo., before A. W. Mead, notary public.

William C. Scott, of lawful age, being produced, sworn, and examined on the part of the defendants, deposes and says:

Am a commission merchant. The name of my firm is Scott &
105 Brother. Have been engaged in this business since 1852, in St. Louis. The date of our last sale to Sherwood, Karns & Co. was on the 21st August, 1867. We sold some flour to them, amounting $416, on which $216 was paid on the 26th August. We tried most every day to collect the balance, until Sherwood, Karns & Co. suspended.

Ques. Do you know of any custom of this port of carriers issuing bills of lading upon orders for property, but before the property was delivered?

Ans. I never heard or knew of such a custom, but have heard of individual instances where such a thing was done. We never accepted from a carrier such a bill of lading. We were not aware that Sherwood, Karns & Co. were purchasing heavily in August, but afterwards we heard they had been.

Cross-examination.

Sherwood, Karns & Co. were in good credit in August. The usual way to obtain money on bills of lading is to draw a draft and attach it to the bill; this will pass without suspicion anywhere.

WM C. SCOTT.

106 *Deposition of William A. Ober, taken on behalf of defendants, May 13th, 1868, at St. Louis, Mo., before A. W. Mead, notary public.*

Deposition of William A. Ober, of lawful age, being produced, sworn, & examined on the part of defendants, deposes and says:

The style of my firm is Lewis Nanson & Co. They are commission merchants. I have been in that firm since January 1, 1867. I have been in the commission business since that date. I sold corn at Price's Landing in August, 1867. I sold a lot of corn at said landing or Commerce at $1 02 per bushel, on the 30th August, 1867. It is my impression it was at Price's Landing. Price's Landing & Commerce are only 20 miles apart. I gave an order for the corn. The object of the order was to deliver the corn to the parties sold. Our firm did business, since I have been connected with it, at St. Louis. The price I sold that corn for was the best price I could obtain.

Cross-examination.

I cannot say positively what corn this was; I think, however,
107 it was white corn; we sold nothing else. I don't know that a bill of lading was given on that order, but I do know of bills of lading being given on orders sometimes, in a few instances, where we gave orders. It sometimes happens that there is a difference of several cents in the price of corn sold about the same time. The market may vary in an hour.

W. A. OBER.

Deposition of David Todd, taken on behalf of defendants, May 13th, 1868, at St. Louis, Mo., before A. W. Mead, notary public.

David Todd, of lawful age, being produced, sworn, and examined on the part of defendants, deposes and says:

108 Have been engaged in shipping grain, buying and selling, at St. Louis since 1851. Have shipped a great deal to New Orleans. I remember purchasing from Booth & Sons, at St. Louis, corn, to be delivered to the barge company at Cairo, 400 bags. I bought the corn about the first or second September. I am not sure whether I got an order or not. I got the bills of lading from Mr. Booth. The date I don't recollect. I mean I got the bills of lading through Mr. Booth. In some cases the bill of lading comes direct from the purchaser; that is a guaranty that I have got the corn. In other instances the bill of lading is sent direct to me from the point of shipment. I saw Booth sell the corn

to Sherwood, Karns & Co. Booth & Sons tried to sell me this corn. I did not purchase, because I thought they asked too much for it. Mr. Booth asked me $1 06 or $1 08 for the corn, but am not positive. I offered $1 03 or $1 04.

Ques. Is there any custom at this port of issuing bills of lading, based upon orders for goods before the goods are received, where goods were at other ports, or was there any such custom in August, 1867?

Ans. I would not consider the custom general, as far as my experience goes.

109 *Cross-examination.*

Ques. Was it not quite common for such bills of lading to be given?

Ans. It was not. I know of its being done once to me, that I recollect of. I only know from report that this was done occasionally. Mr. Booth refused my offer for the corn and insisted upon his price.

DAVID TODD.

Deposition of George H. Rea, taken on behalf of defendants, May 13th, 1868, at St. Louis, Mo., before A. W. Mead, notary public.

George H. Rea, of lawful age, being produced, sworn, and examined on the part of the defendants, deposes and says:

Am a hide and leather dealer in St. Louis; was president of the Mississippi Valley Transportation Company in August, 1867.

110 Ques. Do you know of any custom of this port in August, 1867, of carriers issuing bills of lading based upon orders for property, where the property was not delivered to the carriers, and where the property was at another port?

Ans. It was done in some cases that I know of, a few; but it was not a custom. Those were exceptional cases. I did not personally know at that time of any instances of it being done. Mr. Scudder had no authority from the company to issue such bills of lading. I have heard that he did it, but it was done without the company's knowledge or authority. I had heard of its being done frequently, but I did not know of it when it was done. I don't recollect whether there was much competition for freight or not in August, 1867.

Cross-examination.

I learned from agents of our office that such bills were issued, and that other agents had done it. Mr. Scudder was our general freight agent, & he signed majority of bills of lading. His contracts or bills of lading were never repudiated. The company treated his bills of lading as valid contracts. The company has given orders to stop the

111 practice of giving such bills of lading. It was given when this transaction happened. Nothing was said prior to this time, because I knew nothing of it.

Re-direct.

Ques. How much do Sherwood, Karns & Co. owe your transportation company?

Ans. About $1,2 or $1,500 [dollars.]

GEO. H. REA.

And this was all the evidence offered in said cause, either on the part of plaintiffs or defendants.

And after arguments of counsel thereon to the jury, the defendants asked the court to instruct or charge the jury as follows:

Defendants' instructions.

The court instructs the jury, that if they believe from the evidence that the corn in question was the property of Sherwood, Karns & Co. at the time the same was shipped; that at said time Sherwood, Karns & Co. were indebted to Hamilton & Dunnica, and that an agreement was then in force between said firms that the former was to make shipments of produce to the latter, as their factors; that Sher-
112 wood, Karns & Co. were to be at liberty to draw their drafts against such shipments, and that any suplus or margin of said proceeds, as might be left after the payment of such drafts and expenses, were to be credited on the indebtedness aforesaid; that such agreement did not give Hamilton & Dunnica any lien upon such corn over and above the amount of the draft read in evidence, until said corn, or the bill of lading therefor, came into their possession; and if the jury believe from the evidence that said corn was taken in attachme as the property of Sherwood, Karns & Co., before either the co bill of lading therefor came into the possession of Hamilton & D then the latter had no lien on said corn beyond the amount of t drawn against it, and the plaintiffs cannot recover in this action fo surplus value.

That if the jury believe from the evidence that the corn in question was, at the time of the shipment thereof, the property of Sherwood, Karns & Co.; that at said time Sherwood, Karns & Co. were indebted to Hamilton & Dunnica, and an agreement was then in force between said firms that the former were to ship produce to the latter,
113 as their factors; and that Sherwood, Karns & Co., were to be at liberty to draw their drafts on Hamilton & Dunnica against the proceeds of said shipments; and that any suplus of such proceeds, over and above the amounts of such drafts and expenses, was to be credited on the indebtedness aforesaid; that such agreement did not give to Hamilton & Dunnica a lien on said corn, until the same, or the bill of lading therefor, was delivered to them; and if the jury further believe from the evidence that Sherwood & Karns drew their draft read in evidence, on Hamilton & Dunnica against the proceeds of said corn, attached thereto the bill of lading read in evidence, and negotiated the same to Cole & Brothers, and that Cole & Brother on the 4th of September, A. D. 1867, sent said draft, with said bill of lading so attached, to New Orleans for collection; but, that before the said draft or bill of laden, or the said corn, were received by Hamilton & Dunnica, the said corn was taken in attachment as the property of Sherwood, Karns & Co., then Hamilton & Dunnica never acquired a lien on said corn and cannot recover therefor in this action.

114 That if the jury shall believe from the evidence that the corn in question, in this suit, was levied upon and taken by an officer, to whom the attachment writ in evidence before the jury was directed, that the defendants would not be liable to the plaintiffs therefor in this suit, unless the jury shall further believe from the evidence that the defendants, or some of them, directed the officer to make the seizure, or personally interfered with or took the control of said corn.

And these instructions, or either of them, the court refused to give, to each of which several refusals the defendants at the time excepted.

And the court thereupon instructed the jury as follows:

1. If the jury believe from the evidence that Sherwood, Karns & Co., being the owners of the corn in question, shipped the same to Hamilton & Dunnica, taking a bill of lading therefor, and that it was the understanding of both the consignors and the consignees that the proceeds were to be applied in liquidation of indebtedness from the former to
115 the latter, then the corn, after its delivery to the carrier, was so far the property of the consignees as to authorize them to maintain an action against the creditors of the consignors for causing it to be attached while on its transit to the consignees.

2. So, if the jury believe from the evidence that Sherwood, Karns & Co., being the owners of the corn in question, shipped the same to Hamilton & Dunnica, taking a bill of lading therefor, and that they, at the same time, drew a draft on Hamilton & Dunnica against the proceeds of the corn, payable to their own order, endorsed by them, and attached the bill of lading to the draft, and delivered the same to Cole & Brothers, then the corn, after its delivery to the carrier, was so far the property of the consignees as to authorize them to maintain an action against the creditors of the consignors for causing it to be attached while on its transit to the consignees.

And the said defendants, by their counsel, excepted at the time to the giving of each of said charges, or instructions, as numbered one and two, respectively

The jury having found their verdict for the plaintiffs in the sum
116 of three thousand four hundred and thirty six dollars and twenty-four cents, the defendants moved the court thereupon for a new trial, and assigned as reasons therefor—

1st. Because the verdict is against the evidence.

2nd. Because the verdict is not supported by the evidence.

3rd. Because the court erred in refusing each of the instructions asked by defendants.

4th. Because the court erred in giving instructions, marked one and two, on behalf of plaintiffs.

5th. Because the jury erred in finding for the plaintiff to an amount beyond the amount specified in the draft accepted by plaintiffs, and drawn by Sherwood, Karns & Co. against the corn in the declaration mentioned.

And the court thereupon overruled said motion for a new trial, to which ruling the defendants, by their counsel, then and there excepted, and the court gave judgment, on the verdict, for the amount thereof, & costs of suit.

And now the defendants present this their bill of exceptions,
117 and pray that same be signed, sealed, and made part of the record, and it is so done.

(Signed) S. H. TREAT. [SEAL.]

(Indorsed:) Filed February 15, 1869.

J. A. JONES, *Clk.*

And afterwards, to wit, on the twenty-third day of February, in the year of our Lord one thousand eight hundred and sixty-nine, a bond of appeal was filed in said entitled cause; which said bond of appeal is in the words and figures following, to wit:

Supreme Court of the United States.

THOMAS A. HAMILTON AND JOHN L. DUNNICA, partners under the name & style of Hamilton & Dunnica,
v.
WILLIAM P. HALLIDAY, HENRY L. HALLIDAY, Edwin W Halliday, Thomas W. Halliday, and Rufus P. Robbins.
} Trover & trespass.

Know all men by these presents that we, William P. Halliday,
118 Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins, as principals, and Alfred B. Safford, as surety, are held and firmly bound unto Thomas A. Hamilton and John L. Dunnica in the sum of five thousand dollars, to be paid to the said Thomas A. Hamilton and John L. Dunnica, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this fifteenth day of February, A. D. 1859.

Whereas the above-named William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above named William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins shall prosecute their said writ of error to effect, and answer all damages and costs, if
119 they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WILLIAM P. HALLIDAY. [SEAL.]
HENRY L. HALLIDAY. [SEAL.]
EDWIN W. HALLIDAY. [SEAL.]
THOMAS W. HALLIDAY. [SEAL.]
RUFUS P. ROBBINS. [SEAL.]
ALFRED P. SAFFORD. [SEAL.]

Sealed and delivered in presence of—
W'M P. GILBERT.

Approved:

J. H. TREAT, *Dist. Judge.*

(Indorsed:) Filed February 23rd, 1869.

S. A. JONES, *Clk.*

Afterwards, to wit, on the twenty-fourth day of February, of the year last aforesaid, a citation was issued in said entitled cause; which said citation is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To Thomas A. Hamilton and John L. Dunnica, greeting:

120 You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, & Rufus P. Robbins are defendants, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for said district, this fifteenth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-third.

S. H. TREAT,
District Judge.

We acknowledge service of the above.
Feb'y 24th, 1869.

STUART, EDWARDS & BROWN,
Att'ys for Hamilton & Dunnica.

(Indorsed:) Filed February 24th, 1869.

J. A. JONES, *Clk.*

121 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States in and for the said southern district of Illinois, do hereby certify that the foregoing one hundred and twenty pages contain a full, true, and complete transcript of the papers filed and proceedings thereon had in a certain cause wherein Thomas A. Hamilton and John L. Dunnica are plaintiffs, and William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins are defendants, as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and official seal, at Springfield, in said district, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-fourth.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 283. William P. Halliday, Henry L. Halliday, Edwin W. Halliday, Thomas W. Halliday, and Rufus P. Robbins, plaintiffs in error, vs. Thomas A. Hamilton and John L. Dunnica, partners as Hamilton & Dunnica. S. Illinois C. C. U. S.
Filed 15th November, 1869.

Supreme Court of the U. S.

WILLIAM P. HALLIDAY, AND OTHERS,
Plaintiffs in Error.

vs.

THOMAS A. HAMILTON, AND ANOTHER,
Defendants in Error.

ARGUMENT FOR PLAINTIFFS IN ERROR.

ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel.

SUPREME COURT OF UNITED STATES.

HALLIDAY ET AL vs. HAMILTON ET AL.

This was trover in the Circuit Court for the Southern District of Illinois, brought by Hamilton & Dunnica against Halliday and others, for the conversion of 1,250 sacks of corn, of the value of $6,000. The declaration described one of the plaintiffs as a citizen of Tennessee, and the other of Louisiana, with no allegation of citizenship of the defendants.

Plea, not guilty, trial by jury, and verdict for $3,436.24.

The facts, as they appeared in evidence and as shown by the bill of exceptions, were, that Halliday Bros., of Cairo, Illinois, having 1,250 sacks of corn at Price's Landing, in Missouri, 20 or 21 miles above Cairo, sent a dispatch, received on the 28th of August, 1867, to J. W. Booth & Sons, commission merchants at St. Louis, (*Testimony of Booth, R.*, 34,) to offer the corn for sale. They did so until August 31st, when they were ordered to sell at $1.07 a bushel. On that day, at change, Booth effected a sale of the corn at that price, to Sherwood, of the house of Sherwood, Karns & Co., and gave an order for the corn, either to them or to the agent of the Mississippi Valley Transportation Company, Scudder, who had told him that Sherwood, Karns & Co., would, he thought, buy the corn, and had gone with him to see Sherwood, and perhaps Karns, at the flour table, on change. The order was on Halliday Brothers' agents, Price's Landing, to deliver the corn, either to the Transportation Company or to Sherwood, Karns & Co.'s order.

The sale was a *cash* sale, Booth understanding that when the corn was delivered, and Booth & Sons got the weights, they were to get the money. There was nothing said about it, and when produce was sold on change at St. Louis, and no terms of payment mentioned, it was always understood to be a cash sale.

The corn was sold at the full market price, several cents a bushel more than any body else would offer. [*R.*, 35.] The sale was readily effected. Sherwood says, [*R.*, 12,] that he *thinks* Booth at first asked $1.10 for the corn, but is not positive; that, as he remembers, he did not accept the first offer; but in this, he says, he may be mistaken. Karns (*R.*, 32,) says, that they *did* buy at less than the first offer. Booth says: "I am almost positive they gave me the price I asked. I do not think I asked more than $1.07 on the day of sale. I am not altogether positive as to this, though my impressions are as stated. * * * I think I showed them a dispatch from Halliday Bros., authorizing me to sell at $1.07." He says that he is sure he did not ask more the day before, and thinks he did not on that day; and he did not expect to get more, because he telegraphed daily to Halliday Bros., that he *might* get that price. [*R.*, 34, 36.]

Sherwood, Karns & Co., as Sherwood himself admits, in reply to the question whether they were in an insolvent condition on the 31st of August, were then "hard pressed," and "after developments" proved that they could not then have paid all their debts. [*R.*, 13.] They then owed Cole Bros., of St. Louis, "outside of their current business," $1,000, and that firm had endorsed for them to the amount of $3,000, which had not matured. In July or August they had been under protest, refusing to pay a bill drawn on them by a house in Cincinnati, which, Sherwood says, held property of theirs, and had dishonored *their* draft. [*R.*, 12, 13.] The firm, (Sherwood, Karns & Co.), filed petition in bankruptcy on the 22d of October, and owes $60,000. Sherwood does not know the amount of its available assets, but thinks that if he had the "handling of them" they would amount to more than $10,000. Thinks *he* would make 50 per cent. on them. [*R.*, 13.]

Cole says, [*R.*, 26,] that when his house loaned Sherwood, Karns & Co. $1,000, in January, 1867, they were in embarrassed circumstances. [*R.*, 26.] Afterwards they lost money, "considerable for men of their means." Several other friends had endorsed for them $1,000 each. Sherwood had told Cole he was "pretty hard run and was trying to make arrangements with some New York parties, and seemed to have some hopes in that direction." [*R.*, 27.] They were generally considered to be men of small means. [*R.*, 27.]

Karns, in answer to the question whether the firm was greatly embarrassed on the 31st of August, says: "Yes; we needed more money than we had." But their checks had not then been dishonored. On the 5th of September, he says, they "closed business." On the 4th they paid some parties, and asked others to wait. The firm, as "after developments have proved," was insolvent on the 31st of August. [*R.*, 30.] Cole knew the condition of their affairs as well as any man in the city. They often advised with him; he was their friend, and "to some extent" their communications to him "were of a confidential character." [*R.*, 31.] On the 31st of August they owed from $30,000 to $40,000. [*Ib.*]

Karns says, [*R.*, 32,] that he neither *knew* nor *supposed* they were insolvent when they bought the corn. They thought they could work through.

Booth [*R.*, 35,] heard of their failing condition on the 4th of September, and believes it was generally so understood in the city. Among business men it was considered a pretty large failure.

On the 4th he presented a bill for the corn, could get nothing, and was satisfied they were broke. [*R.*, 35.] He learned, *after* the 31st of August, that some parties would not sell to them on that day. [*R.*, 36.]

On the 24th of August they bought flour of Whittaker, Virden & Gray, which was never paid for. [*R.*, 37.]

On the 30th of August, Ober, a commission merchant at St. Louis, sold a lot of corn that was at or near Price's Landing, at $1.02 a bushel. It was the best price he could obtain. [*R.*, 39.] And Fenby, a grain and produce merchant at St. Louis says, that corn was dull in New Orleans on the 31st, quoted at $1.20 to $1.25 a bushel, and that the price in St. Louis would not pay to ship it to New Orleans. [*R.*, 38.]

As soon as the purchase was made, Scudder gave Sherwood, Karns & Co. a bill of lading, acknowledging to have received, at St. Louis, on the 31st of August, 1867, in apparent good order, on board the good steamboat Bee and barges, the 1,250 sacks of corn, marked 20,305, to be delivered to Hamilton and Dunnica, New Orleans. [*R.*, 7, 14.]

Having this bill of lading, while the corn was at Price's Landing, near Cairo, Sherwood, Karns & Co. on the same day drew on Hamilton & Dunnica, New Orleans, for $2,500, payable 20 days after date, to the order of themselves, value

received, to be charged "to account of shipment of 1,200 bags white corn per Bee and barges, 50 bags yellow corn." [*R.*, 6, 11.]

At the time when the corn should have reached New Orleans, Sherwood, Karns & Co. owed Hamilton & Dunnica nearly $10,000, [*R.*, 14,] since reduced to $7,624.02. The account exhibited with Dunnica's deposition, [*R.*, 16,] shows debits for drafts entered and charged as of September, 1867, $1,200 due and paid September 19; $1,920, due and paid September 23; $1,400, due and paid September 16; $825, due and paid September 20; $2,500, due and paid September 23. Against this and other items, they credit cash balance Septembor 13, $503.74, and proceeds of sales of flour on the 21st, 25th and 30th of September, sold in October, several amounts, leaving a balance of $5,216.38, to which is added the amount of a draft for $2,335, drawn on Sherwood, Karns & Co. for Cole Bros. and not paid, and interest $72.64, making the whole amount due $7,624.02, on the 24th of October.

The price of the corn due Booth and Sons for Halliday Bros., from Sherwood & Karns, was $2,844.19.

As soon as Sherwood got the bill of lading he took it, on the same day, during bank hours, with the draft on Hamilton & Dunnica, to Cole Bros., who discounted it and gave a check for the proceeds, receiving the bill of lading with the draft. [*R.*, 11, 12.] The draft, it will be noticed, was at 20 days, and it would take the corn about 7 to reach New Orleans. [*R*, 11.]

After payment of the draft, Sherwood says, [*R.*, 12,] the residue of the proceeds of the corn was to be placed to credit in account current, of Sherwood, Karns & Co., with Hamilton & Dunnica, who were their factors in New Orleans.

Cole Bros. deposited the draft, for collection, with the St. Louis National Bank, on the 4th of September, *the day that Sherwood, Karns & Co. failed.* That bank sent it to the Citizens Bank, of Louisiana, and on the 28th was advised of its payment. [*R.*, 13.] The Citizens Bank had it presented for acceptance, and it was accepted, and at maturity paid on the 23d of September. The Bee and barges arrived in New Orleans about the 15th, Dunnica says, [*R.*, 14.] The acceptance has no date, [*R.*, 6., 15,] and Dunnica does not state the date of it.

The firm of Cole Bros., at St. Louis, were employed to

solicit consignments to, and get business for Hamilton & Dunnica, and when shipments were made to that firm, they made advances on the bills of lading. They divided commissions with them, and were advertised to make advances on shipments to them. [*R.*, 25, 27.] Having the money they purchased this particular bill, without going to the bank, and supposing that the corn was actually on the Bee and barges.

They solicited business for Hamilton and Dunnica, and these, in return, solicited for them, and the commissions were mutually divided. The advances made by them were with their own money, and they had no other authority to act for Hamilton & Dunnica, than to solicit shipments and make advances, not having *their* funds to advance from. They were simply consignees, throwing business into their hands, and their consignees of whatever might come to them through their means. The advances made by them were returned when the consignments were sold. Their drafts were paid at maturity, whether the produce had been sold or not, and did not go into any account between them, nor did they receive any commissions on them. They had no interest in the commissions charged by Hamilton & Dunnica for accepting. [*R.*, 28, 29.]

The President of the Transportation Company testified that it was not a custom to give bills of lading when the property had not been delivered to its agents. Scudder had no authority to give such bills of lading. It was done now and then, in a few exceptional cases, but without the company's knowledge or authority: (*R.*, 20.) Cole knew of no such custom, and did not receive bills of lading given on mere orders for freight. [*R.*, 25, 27.] Booth says, there was no such custom. He was not aware, at the time, that it had ever been done, but afterwards learned that it had been occasionally done, but it was not customary. [*R.*, 35.] Virden, Fenby, Scott, Ober, and Rea, all say that, though it was done occasionally, there was no such custom. (*R.*, 37, 38, 39, 40.)

Booth did not know until the 2d or 3d of September, that a bill of lading had been given. Then Scudder told him. He was much surprised, and taking in connection the readiness with which the corn was purchased, he felt uneasy. He could not get the money for the corn, and telegraphed Halliday Bros. to stop it. On the 4th of September he was satis-

fied that Sherwood, Karns & Co. had been broke for some time.

On the 29th of August, Sherwood, Karns & Co. bought 183 barrels of flour of Morris, Peters & Co., for which they never paid. [*R.*, 33.] On the 21st of September they have credit with Hamilton & Dunnica for 180 barrels, $1,176.04. [*R.*, 16.]

And Karns says, [*R.*, 33,] that there was an understanding between them and Hamilton & Dunnica, that any balance from sales of produce shipped were to be credited on the general account. (*R.*, 33.) This shipment, he says, was made like all other shipments to them, and was made after that understanding, which applied to all shipments made to them. (*Ib.*) In other words, Hamilton & Dunnica had a right to retain for their general balance, whatever Sherwood, Karns & Co. could buy for cash and fail to pay for, when actually insolvent, and willing to take at the highest prices, produce which, it is evident, they did not dream of paying for.

Halliday Bros., advised by Booth & Sons that they were about to be defrauded of their property and its price, attempted to protect themselves, and on the 5th of September sued out of the Court of Common Pleas of the City of Cairo, a writ of attachment, upon affidavit that Sherwood, Karns & Co. were indebted to them in the sum of about 2,800 bushels of corn sold and delivered, and that Sherwood, Karns & Co. were not residents of Illinois. (*R.*, 17.)

Under this writ, the identical 1,250 sacks of corn were seized, (19,) the advertisement was made (22,) and judgment rendered (22,) for $2,941.70, under which, on special execution, the corn was sold for $2,266.26, of which $2,014.25 was paid over to Halliday Bros. Sherwood, Karns & Co. owed for it $2,844.19. The difference and counsel fees and expenses, Halliday Bros. have lost, (23, 24.)

If the corn had reached New Orleans, it would have sold at $1.30 for white, (1,200 sacks, of about 2¼ bushels each, or 2,700 bushels, $3,410;) and $1.25 yellow, (50 sacks, or 112½ bushels, $140.62.) (*R.*, 14.) Cole was of course anxious to get this amount into the hands of Hamilton & Dunnica, as he would share equally the commissions upon it, and would also put in their hands a surplus of $1,050, to diminish the indebtedness of Sherwood, Karns & Co. to them, after judgment of the draft of $2,500.

"After this thing transpired," he says, "*as a matter of favor to Hamilton & Dunnica*, I voluntarily offered to pay one-half of any loss that might accrue from it," and yet, "we had no previous arrangement as to losses." It is not usual for business men to offer to pay moneys which they do not owe.

Cole says, [*Rec.* 25], "Sherwood, Karns, & Co., were *in the habit* of shipping," to Hamilton & Dunnica, "and we were in the habit of taking their bills drawn this way. They shipped every few days. We were advancing every few days on bills drawn on such shipments." Karns says that his firm had been in the habit for two years, of assigning to Hamilton & Dunnica, produce and flour to be sold on their account; and that Cole Bros. sometimes purchased their bills drawn on such shipments, but only when they saw fit, being under no obligation to do so.

The purchase was made on the 31st of August. The draft drawn that day, and that day purchased by Cole Bros., was placed in bank in St. Louis for collection, on the 4th of September. It could not have reached New Orleans by mail before the 6th, nor been presented for acceptance before the 7th. On the 5th Halliday Bros., found the corn at Cairo, and attached it. It is natural to suppose that the master of the steamer and barges would immediately advise Hamilton & Dunnica by telegraph, of the seizure. But what is certain is, that even if not informed of the seizure before accepting, they accepted the draft at least one whole day after the seizure. They do not state when they accepted, and therefore it is fair to presume that Dunnica believed, when testifying, that to state the truth would not benefit their case.

The bill of lading was not sent direct to them. The draft was attached to it, and deposited with it in the bank at St. Louis, and there is no evidence of any advice to them either of the shipment or of drawing the draft, prior to its presentation for acceptance. There is no proof that they knew of the shipment, or of the draft, on the 5th, when the corn was attached; and Dunnica confines his testimony entirely to this single shipment, except so far as the account which he appends to his testimony shows other shipments and advances; and that account commences on the 13th of September, with a *credit* in favor of Sherwood, Karns & Co., as balance due on account rendered. He says nothing of any arrangement or agreement with Sherwood, Karns & Co., to accept for them or make advances on shipments.

The defendants below asked the court to instruct the jury, that if they believed from the evidence that the corn was the property of Sherwood, Karns & Co. when shipped; that they were then indebted to Hamilton & Dunnica, and an agreement was then in force between the two firms, that the former was to make shipments of produce to the latter, as their factors, and that the former were to be at liberty to draw against such shipments, and any excess of proceeds of sale over amount of acceptances and expenses, was to be credited on the indebtedness. This agreement gave Hamilton & Dunnica no lien on the corn beyond the amount of the draft, until the corn, or the bill of lading for it, came to their possession; and if the seizure was made before the corn or the bill of lading came to the hands of Hamilton & Dunnica, they had no lien on the corn, beyond the amount of the draft drawn against it, and the plaintiff could recover only that amount. and also that if they found the same facts, this agreement did not give Hamilton & Dunnica a lien on the corn, until it or the bill of lading was delivered to them; and that if the corn was seized by the attachment, before the draft or bill of lading for the corn was received by Hamilton & Dunnica, then they never acquired a lien on the corn.

And also, that the defendants were not liable to the plaintiffs in the suit, unless they, or some of them directed the officer to make the seizure, or personally interfered with, or took control of the corn.

The court refused to give these instructions, and, instead, instructed the jury that if Sherwood, Karns & Co., being owners of the corn, shipped it to Hamilton & Dunnica, taking a bill of lading for it, and it was the understanding of both, that the proceeds were to be applied "in liquidation of indebtedness from the former to the latter," then the corn, after its delivery to the carrier, was so far the property of the consignees, as to authorize them to maintain an action against the creditors of the consignors, for causing it to be attached while *in transitu*."

And so that if Sherwood, Karns & Co., being owners of the corn, shipped it to Hamilton & Dunnica, taking a bill of lading therefor, and at the same time drew on them against the proceeds, payable to their own order, and endorsed by them, and delivered the same to Cole Bros., then the corn, after its delivery to the carrier, was so far the property of the consignees, as to authorize them to maintain such action.

The defendants excepted to the refusal to give the instruc-

tions asked, and the giving of those that were given by the court. The jury gave a verdict for $3,436.24, and the defendants moved for a new trial, assigning, for one reason, the error of the court in refusing and giving the instructions. The motion was overruled, and to that the defendants excepted, and their bill of exceptions was signed, sealed and enrolled.

The decision of the court in the case of *The Memphis and Charleston Railroad Company* vs. *Reeves* has relieved us of the necessity of justifying the vicious practice of reserving exceptions to instructions, moving for a new trial, and, in excepting to the refusal to grant that motion, falling back upon the exceptions taken before that motion was made.

Hamilton & Dunnica assert such a general or special property in the corn in question, as entitled them to maintain trover against the vendor of their consignor, attaching it for the unpaid price, in transitu. The ground of their claim is, that, after it was attached, a bill of lading for it, accompanied by the draft of the consignor, reached them and was accepted, that they paid it after learning that the seizure had been made, and that the consignor was also indebted to them on account of advances on other shipments, *as to which there is no proof that they accepted before the seizure*, and they were certainly paid long after it; *the earliest date of debit in their account being September* 13, *which must therefore be deemed* (in the absence of any other evidence as to the time when they accepted the draft drawn against this particular shipment,) *the date of all their acceptances for Sherwood, Karns & Co.*

The amount of the draft drawn against *this* shipment, was $2,500. The court gave the factors judgment for the value of the corn in New Orleans, for it cost in St. Louis only $2,844.19, and the judgment was for $3,436.24. It follows that the court held that they had a *lien* on the corn, and a special *property* in it, to secure *the whole amount due them*, on other acceptances as well as the one drawn against this shipment. In other words, as a factor has a right to *retain* prop-

erty or proceeds actually in his hands, for his general balance, so he has a lien to secure that balance, on property *in transitu* to him.

Bills of lading, by the law merchant, are representatives of the property for which they have been given, and the endorsement and delivery of a bill of lading transfers the property from the vendor to the vendee, is a complete legal delivery of the goods, and divests the vendor's lien. *Lickbarrow* v. *Mason*, 2 *Term. R.*, 63.

But it is clearly not "a complete legal delivery of the goods," when the goods are not yet received by the carrier, are at a distance of a hundred and fifty miles from the place where it is given, may never be received by him, and it is given before they are paid for, upon an order for their delivery to the carrier.

Though the vendor's lien is thus divested, by reason of the complete delivery of the *indicia* of property, he may, if the goods have not yet reached the actual possession of the buyer, and if no third person has acquired rights by obtaining a transfer of the bill of lading from the buyer, intercept the goods in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage *in transitu*.

The corn in this case was *in transitu*, not to Sherwood, Karns & Co., at St. Louis, the purchasers, but to their consignees in New Orleans. It had never come to their *actual* possession, and they had no *right* to the possession, until they paid for the corn, though they had an order for it. If, upon their order, the carrier had been on his way with the corn to St. Louis, to deliver it to them, of course the right of stoppage *in transitu* would have continued. It cannot make any difference that they had ordered it to be conveyed to New Orleans, and there delivered to their consignee.

If the corn had been actually on board the vessels, Cole Brothers would have gained a special property in it, by virtue of the transfer to them of the bill of lading attached to the draft which they purchased.

But the corn in this case was *not* on board the vessels; nor in the possession of the Transportation Company, at all, when the bill of lading was given. It simply stated a *lie*,—that the corn had been received on board, when it had not, and was not within present reach, but one hundred and fifty or more miles distant.

The *order* given by Booth for the delivery of the corn to

Halliday's agents at Price's Landing, did not effect a change of possession and actual receipt of the corn, because the bailee or agent who held it in possession had not accepted or recognized it, or consented to act in accordance with it. Until he had so agreed, he remained agent and bailee of Halliday Bros. *Bentall v. Burn*, 3 *B. & C.*, 423. See also *Lackington v. Atherton*, 7 *M. & G.*, 360; *Bill v. Bament*, 9 *M. & W.*, 36; *Lucas v. Dorrien*, 7 *Taunt.*, 278; *Woodley v. Coventry*, 2 *H. & C.*, 164, 32 *L. J. Exch.*, 185; *Harman v. Anderson*, 2 *Camp.*, 243; *Farina v. Home*, 16 *M. & W.*, 119; *Godts v. Rose*, 17 *C. B.* 229, *and* 25 *L J., C. P.*, 61.

The delivery of the goods *themselves* to a common carrier, *à fortiori* to one specially designated by the purchaser, for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. The carrier is considered *his* bailee. Upon the delivery to the carrier at Price's Landing, and not until then, there was an actual receipt of the corn by Sherwood, Karns & Co. After that, Halliday Bros. had "not what is called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of their original ownership," and consistent with the property being in Sherwood, Karns & Co. In *Dodsley v. Varley*, 7 *B. & C.*, 484, the plaintiff was held to have retained that, "in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination, before payment. "The sale of the corn to Sherwood, Karns & Co. was a cash sale, and they had no right to have the corn without paying the money.

In *M'Ewan v. Smith*, 2 *H. of L., Ca.*, 309, and *Griffiths v. Perry*, 1 *E. & E.*, 680; 28 *L. J. Q. B.*, 208, it was held that an order for the delivery of goods differed in effect from a bill of lading; that the endorsment of it by a vendee to a subvendee was unavailing to oust the possession of the original vendee, and that his lien remained unaffected, when neither the first buyer nor the second vendee had proved the acceptance of the order, nor taken actual possession of the goods before the order was countermanded. See *Blackburn on Sales*, 297; *Benjamin*, 613; *Farina v. Home*, 16 *M. & W.*, 119.

There was certainly no sale, under the Statute of Frauds, until the actual delivery of the corn at Price's Landing, to the carrier. The buyer had not *accepted* part of the corn,

and actually *received* the same; nor given anything in earnest to bind the bargain, or in part payment; nor was any note or memorandum in writing of the bargain made and signed according to the statute.

The corn consisted of, 200 sacks of *white* corn and 50 sacks of yellow corn, and it was to be paid for in cash at $1.07 per bushel. Until weighed, and the weights reported at St. Louis, the price could not be ascertained; and the law is, that where anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things is a condition precedent to the transfer of the property, although the individual goods are ascertained, and they are in the State in which they ought to be accepted. *Blackburn on Sales*, 151, *Benjamin*, 221; *Rugg v. Minett*, 11 *East.*, 210; *Hanson v. Meyer*, 6 *East.*, 614; *Zagury v. Furnell*, 2 *Camp.*, 240; *Simmons v. Swift*, 5 *B. & C.*, 857; and other cases cited by Benjamin, at pp. 223 and 224.

In every sale, when nothing is said in regard to payment, and no credit is given, it is implied that there is to be *absolute* payment in cash. As soon as a sale is completed by mutual assent, and no time given, the buyer is bound to make payment at once, if the goods are ready for delivery, without waiting for a demand. 1 *Wms. Saunders*, 33 *b. n.* 2. *Benjamin*, 524. The default of payment arises *ex re*; and *Dies interepellat pro homine* was a maxim of the Roman law. The citations for this are given by Benjamin, at *p.* 555.

Generally, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods. *Simmons* v. *Swift*, 5 *B. & C.* 862. *Dixon* v. *Yates*, 5 *Ad. & Ell.*, 313, 340. *Turling* v. *Baxter*, 6 *B. & C.*, 360. By a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and *a right to the price in the seller*, unless it can be shown that such was not the intention of the parties. *Gilmour* v. *Supple*, 11 *Moore, P. C.* 566. *Calcutta Company* v. *De Mattos*, 32 *L J. Q. B.*, 322, 328.

Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is

liable to deliver them whenever they are demanded, *upon the payment of the price:* but the buyer *has no right to have possession of the goods till he pays the price. Bloxam* v. *Saunders*, 4 *B. & C.*, 941.

This, necessarily, is *a fortiori* so, when, as Booth proves in this case, it was a *cash* sale, and when the corn was delivered and the weights ascertained, the price was to be paid. Until the weight was ascertained, at least, there was no sale; and Halliday Bros. could have refused to permit the corn to be shipped until the price was paid. The seller's right in respect of the price, is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion; and payment or a tender of the price is a condition precedent on the buyer's part; and until he makes such payment or tender, *he has no right to the possession.*

Even where goods are sold on credit, and the vendee is immediately entitled to possession, and the right of possession and the right of property vest at once in him, his right of possession is not absolute, but is liable to be defeated, if he becomes insolvent before he obtains possession. The property is vested in the purchaser, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency without payment of the price defeats that right. *Bloxman* v. *Sanders*, *ub. sup. Spartali & Benecke*, 10 *C. B.* 212; 19 *L. J. C. P.* 293.

The right a purchase gives, is a right to have possession on payment of the price. And if Sherwood, Karns & Co. were insolvent, as it is conclusively proven, even by their own admission, they were, when the corn was received by the carrier, they had no right to the possession, though, if they had been solvent, and *could* have paid for it in St. Louis, they would, under the contract of sale, have had a right to receive it, send it forward, and pay Booth & Co. for it, at St. Louis, on receipt of the weights.

Until the Transportation Company took the corn, it was in the possession of Halliday Bros. No doubt the arrangement made by Booth, giving an order absolute to the carrier for the corn, and agreeing that it should be paid for at St. Louis, after the carrier should have received it, waived the lien for the price.

But where the delivery has been effected by the vendor agreeing to hold as bailee for the vendee, the unpaid ven-

dor is still deemed to be in the actual possession of the goods, for the purpose of exercising his remedies on them, in order to obtain payment of the price. It was so held, even where the vender had given a written paper acknowledging that he held the goods for the buyer, and subject to the buyer's orders. *Townley* v. *Crump*, 4 *Ad. & El.*, 58.

Accordingly, in *Bloxam* v. *Sanders* and *Bloxam* v. *Morley*, 4 *B & C.*, 941, 951, the assignees of the insolvent buyer were held not entitled to maintain trover against the unpaid vendor, who had sold the goods on credit, but still held them in his own warehouse. To the same effect is *Miles* v. *Gorton*, 2 *C. & M.*, 504.

In *Townley* v. *Crump*, 4 *Ad. & El.*, 58, the court held that a delivery order did not operate to prevent the vendor's lien from attaching, where a vendor who was himself the warehouse man, sold to a party who became bankrupt, before the goods were removed from the warehouse; and that there was no general usage that could divest the vendor's right in such a case, upon the insolvency of the vendee.

In *Dodsley* v. *Varley*, 12 *Ad. & El.*, 632, wool was received by the defendant, and removed to the warehouse of a third person, the price having been agreed on, but the wool having to be weighed. It was weighed there, and packed, but not paid for. The court held that it was in the *defendant's* warehouse, and he in *actual* possession, *as soon* as it was weighed and packed. But, consistently with this, the plaintiff had "not what is commonly called a lien determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the *property* being in the defendant."

In *Valpy* v. *Oakeley*, 16 Q. B., 941; 20 L. J. Q. B. 380, bills given for the price were not paid. The court held that the parties were placed in the same condition as if the bills had never been given, and the contract had been to pay in ready money. The vendor's lien attached, and he could retain the goods until he was paid. See also *Griffiths* v. *Perry*, 1 *E. & E.*, 680; 28 *L. J., Q. B.* 204,—another case of insolvency.

In *Dixon* v. *Yates*, 6 *B & Ad.*, 313, delivery orders had been given, for goods in a warehouse of a third party. The court held that the purchaser had never had possession, though he had done several acts that were insisted to have amounted to that; and *Parke* J. said. "The rule is clear, that a sub-

vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee, under whom he claims: he gets the title, defeasible on the non-payment of the price by the first vendee."

In *McEwan*, v. *Smith* 2 *H. of Lords*, *Cas.*, 309, a delivery order was given for sugars, in the warehouse of the vendors' agent. McEwan bought the sugars, (still in the warehouse,) from the vendees, and they endorsed the delivery order to him. The vendees failed, and then the sub-vendee demanded the sugar. The court refused to assent to the argument that a delivery note endorsed to a third party, operated a kind of estoppel, and that it was a kind of fraud to give it and then deprive such third person of the benefit of it. The court said that the argument had no foundation at all, and could not be adopted without converting a delivery note into a bill of lading.

It is very clear that there was no sale completed in this case, until the corn had been weighed, and delivered to the carrier, which, as it was attached at Cairo, 20 or 21 miles below, on the 5th, could not have been done before the 4th, at which time Sherwood, Karns & Co. were insolvent: and that, notwithstanding the delivery order, Halliday Brothers could have refused to give up the possession, and the purchaser had no *right* to it.

We may go further and say that the evidence would satisfy a jury, or at least *ought* to do so, that Sherwood, Karns & Co. bought the corn and took the delivery order with a preconceived design of not paying for it. This, under the earlier decisions, was such a fraud as would vitiate the the sale, and prevent the property from passing; and under the later ones, it gave Halliday a right to rescind.

No doubt, also, he had a right to stop the corn *in transitu*.

In *Jenkyns* v. *Usborne* 7 *M. & G.*, 678; 8 *Scott, N. R.*, 505, beans were sold by the plaintiff, on credit, to one Thomas, and a delivery order for them given. On this Thomas obtained an advance from the defendant, and stopped payment before the vessel arrived and before paying for the goods, which were on their way from abroad to London. On their arrival, the plaintiff notified the master not to deliver them; and the right of stoppage was maintained by the court.

This right does not depend on the fact that the vendor, having had a lien and parted with it, may get it back again if he can stop the goods in transit, but is a right arising out of his relation to the goods *as* vendor, *which is greater than a*

lien. The unpaid vendor's right to stoppage is higher in its nature than a carrier's lien *for a general balance*, though not for the special charges on the goods sent; and he may also maintain his claim as paramount to that of the creditor of the buyer, who has attached the goods while in transit. *Oppenheim* v. *Russell*, 3 *B. & P.*, 42. *Smith* v. *Goss*, 1 *Camp.*, 282.

The stoppage *in transitu* is called into existence for the vendor's benefit, after the buyer has acquired *title*, and *right* of possession, and even *constructive* possession, but not yet *actual* possession. The delivery by the vendor, to a carrier of any description, either expressly or by implication named by the vendee (in this case the vendee named the Transportation Company and engaged its services through Scudder, and Booth's delivery order was to deliver, not to *Sherwood, Karns & Co.*, but to that Company, for the account of Sherwood, Karns & Co.), and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right, if unpaid, and if the vendee is insolvent, to re-take the goods, before they are actually delivered to the vendee, or to some one whom he means to be his *agent* to take possession and *keep* the goods for him. This *actual* delivery, to the vendee or his agent, determines the transit. *James* v. *Griffin*, 2 *M. & W.*, 633.

Goods are liable to stoppage so long as they remain in the possession of the carrier, *as* carrier; and it makes no difference that he has been named or appointed by the vendee. *Mills* v. *Ball*, 2 *B. & P.* 457. *Holst* v. *Pownall*, 1 *Esp.*, 240. *Northey* v. *Field*, 2 *Esp.* 613, *&c.* cited by *Benjamin*, p. 635. Even if carried on the vendee's own vessel, the effect of delivery may be restrained by stating in the bill of lading that it is to the Master as an agent for *carriage*, and not to receive possession for the purchaser. *Turner* v. *Liverpool Docks Trustees*, 6 *Exch.*, 543. *Schotsman* v. *Lancaster & York Railw. Co.*, *L. R.* 2; *Ch. App.*, 332; 36 L. J., Ch. 361. See also *Berndtson* v. *Strang*, *L. R.* 4. *Eq.*, 481; 36 *L. J. Ch.*, 879.

Where goods are sold *to be sent to a particular destination named by the vendee*, the right of the vendor to stop them continues until they arrive at that place of destination. The transitus is not at an end until the goods have reached the place named by the buyer to the seller, as the place of destination. *Coates* v. *Railton*, 6 *B. & C.*, 422, and see *Smith* v. *Goss*, 1 *Camp.*, 282. *Jackson* v. *Nichol*, 5 *Bing., N. C.*, 508.

The ~~evidence~~ of the right of stoppage does not affect the

passage of the property to the vendee. The right of property passes. Indeed, unless the property passed, there would be no need of that right. The only effect of the property passing is, that from that time the goods are at the risk of the buyer. But it by no means follows that the buyer is to have possession unless he pays for the goods. *Bolton v. Lancashire & Yorkshire Railway Co.*, *L. R.* 1, *C. P.*, 441; 35 *L. J.*, *C. P.*, 137.

A mere notice to the carrier, or a demand on him for the goods is sufficient exercise of the right. *Litt* v. *Cowley*, 7 *Taunt.*, 168; 2 *Marsh*, 457; *Bohtlingk* v. *Inglis*, 3 *East*, 397. *The Tigress*, 32 *L. J.*, *Adm.* 96.

And their right of stoppage *in transitu* is defeasible in one way only, and that is when the goods are represented by a bill of lading, which is a symbol of property, and when the vendee, being in possession of the bill of lading, *with the vendor's assent*, transfers it to a third person, who *bonâ fide* gives value for it.

As the right of stoppage is not only *consistent* with the vendee's right of property, but pre-supposes it, and could not exist if he had *not* the ownership, the vendor may, of course, procure its seizure by attachment, to satisfy the unpaid price. And if a mere *notice* to the carrier, to *hold* the goods, and not deliver to the consignee or vendee, is enough, and the vendor could take actual possession, and if he did not, the carrier would hold them to satisfy his lien; and if the vendor has a right to enforce and have satisfaction of the lien, and to that end may hold the goods, when he has stopped them, and after a reasonable time, and by *some* process or other may have them sold; and if his mere assertion of his right of stoppage, even by a bare notice to the carrier, would establish and make available the superiority of his lien, over any of the consignees, why is not a seizure by attachment a perfectly valid exercise of the right of stoppage *in transitu?* A mere notice to the carrier in this case would have effected nothing, unless he chose to deliver up the goods. He could not *remain* at Cairo and hold them there for Halliday. If he carried them on, Halliday would have to follow them, and assert at New Orleans his right to possession of them. If the carrier had chosen to give them up at Cairo, what steps would have been necessary to obtain a sale of them? If any *legal* steps, the proceeding by attachment was as proper as any.

The attachment, therefore, was the only available, and the

most proper mode, of *effectually* and with certainty exercising the admitted right. Did Halliday lose his lien by, or subordinate it to that of Hamilton & Dunnica? Certainly he did not, on the ground that he thereby admitted the ownership of Sherwood, Karns & Co. The exercise of the right in *any* way would admit that. On the contrary, he asserted his claim on the corn for the price, by the seizure, and having so obtained the *legal* advantage, Hamilton & Dunnica could not oust him of that with their equity, because they had no legal title or ownership, and upon the production of *their* equity, Halliday could point to his superior one. In short, he had a right to have the goods in his own possession, or in the custody of the law, to be sold for satisfaction of the unpaid price; and he used the process of the court to place it in the custody of the law, for that purpose.

If Halliday Bros. had taken the bill of lading and delivered it to Sherwood, Karns & Co., and they had assigned it, even to a person not a vendee, but to one from whom they had borrowed money on the faith of it, Halliday Bros'. right of stoppage would have ended. If the bill of lading had been given at Price's Landing, on the 4th, (if the corn was shipped that day,) and it had then been assigned to Cole Bros. as security for a draft discounted by them, the right of stoppage *in transitu* would have ended.

But when the bill of lading was given, it was a fraud, with which Halliday Bros. had no concern. They were no parties to it, nor could be affected by any of its consequences. If Cole Bros. *did not know* that the corn was not actually on board the Bee and barges, as the bill of lading stated it to be, Sherwood, Karns & Co. were guilty of *escroquerie*, of obtaining money by false pretences.

At all events, the corn was not then the property of Sherwood, Karns & Co. It was still to be weighed and the amount of the price determined. The bill of lading was a nullity, because it was a lie. No such corn was then on board the Bee and barges. It might never be on them. If a gold certificate were given by a bank, certifying that A had $10,000 in gold coin in the bank, when he had not a dollar there, no *lien* could be created by virtue of it in favor of any one making an advance on the faith of the certificate, for the simple reason that there would be nothing for the lien to live and feed upon. The incident cannot exist without the principal thing. The bill of lading could not create a lien on the corn which was at a distance, and might never

be upon the vessels or in the carrier's charge, and might be destroyed or removed, or sold to some one else before the vessels should reach the place where it was. Cole swears that he supposed, of course, that the corn was on hand; and yet he admits that he knew boats did often give bills of lading when the goods were at ports below. The delivery order had been given to Scudder. [R. 8.]

The title of *bona fide* third persons will prevail against the vendor who has actually transferred the bill of lading to the vendee, although the vendee's fraud may have procured such delivery; because a transfer obtained by fraud is only voidable. *Pease* v. *Gloahec*, *L. R.* 1, *P. C. App.*, 219. But here, however innocent Cole may have been, and how basely soever deceived by Sherwood, Karns & Co., he advanced his money upon a mere lie, a false statement made by an agent of a Transportation Company that certain corn was on board their vessels, when it *was* not on board, and might never have been.

When the corn *was* received, did the possession of it by the carrier retroact so as to make the discount of the draft by Cole Bros. to have been an advance upon a shipment not made at the time? Undoubtedly, as against Sherwood, Karns & Co. They could take no benefit of their own fraud, if it *was* a fraud on him, which he does not allege or seem to be indignant at. But it could not so retroact as to make the loan to have been, as against other creditors, anything more than a mere discount of a draft, upon the faith of a written falsehood. *The bill of lading was a lie at the beginning, and it always continued such.* It never became true that the corn was shipped at St. Louis. He never advanced money on a shipment from Price's Landing.

All the equities are on the side of Halliday Bros. The corn was really *theirs* all the time; for the purchase was a swindle and as much a robbery as if Sherwood, Karns & Co. had robbed their safe. They have a clear right to the benefit of all legal and even technical objections to the claim of a paramount lien on the part of Cole Bros. or Hamilton & Dunnica. For their agent simply gave an order upon the agent at Price's Landing, for the delivery of the corn to the carrier; and if Cole was defrauded, they are not in the least responsible. He trusted and was deceived; they did not.

When Cole Bros. discounted the draft in question, the sale of the corn was not complete. It was still in the possession of Halliday Bros., with the right to retain it until

the purchase money should be paid. It was still to be weighed, and the price thus ascertained. Halliday & Bros. still retained their right to stop it in transitu, even after it should have been delivered to the carrier, upon the insolvency in fact, whether known and proclaimed or not, of Sherwood, Karns & Co. What interest in the corn, or *right* to control it, or charge upon it, could Cole Bros. obtain by making an advance upon, not a genuine and true bill of lading, but upon a false statement of an impossibility, of a fact inconsistent with the condition of the property and the rights of vendor and vendee?

Having no such rights, they could transfer none on Hamilton & Dunnica. *Their* rights can date only from the day when they accepted the draft. For they do not pretend that they had previously *agreed* to accept it, or to accept any draft or drafts of Sherwood, Karns & Co.; or prove that there was any agreement or arrangement whatever about accepting between them, or that they knew of the shipment or the drawing of the draft, until it was presented to them, *after Halliday Bros.* had *attached*, for acceptance.

Now, Hamilton & Dunnica claim that by the drawing upon them of this draft, and their acceptance of it after the seizure, and their payment of it long afterwards, they became *owners* of the corn, with a special property in it, which will sustain an action of trover against Halliday Bros.

And that action of trover they bring against parties who simply sued out an attachment against Sherwood, Karns & Co. for a debt, which is not denied, upon which debt this particular corn was attached as the property of Sherwood, Karns & Co., was claimed by no other person, and upon judgment for the debt, was sold by judicial process, and the proceeds paid over to Halliday Bros., in satisfaction of so much of their debt.

Had Hamilton & Dunnica such title or right of possession as would maintain trover?

If they had it, could they maintain it against the attaching creditor?

If they could, by what law or process of logic is it made to appear that they can recover, not only what they paid on account of the corn in question, but what Sherwood, Karns & Co. owed them on general account? Was the corn *theirs*, so that they could recover its whole value?

And, could they recover what the corn would have been worth if it had reached New Orleans, or only what it was

worth when and where attached, or only the amount of money received by Halliday Bros. of the proceeds of sale?

The endorsement of a bill of lading gives no better right to the goods than the endorser himself had. A bill of lading is not negotiable in the same sense as a bill of exchange; but the title of *bonâ fide* third persons to whom the vendee endorses the bill of lading, will prevail against the vendor who has actually transferred to the vendee.

The writ of attachment was sued out by Halliday Bros. upon advices from their agents, Booth & Co., that they had better stop the corn, and the officer levying the writ was informed upon what to levy it, and demanded the identical corn shipped at Price's Landing. This was an election on the part of Halliday Bros. to affirm the sale and a recognition of the property of Sherwood, Karns & Co.

But if they had exercised otherwise their right of stoppage *in transitu*, they would equally have recognized and admitted that ownership. The exercise of that right does not re-invest the vendor with the title. "The vendor's right to detain the thing sold, against the purchaser, must be considered as a right of lien till the price is paid, not a right to rescind the bargain." *Martindale* v. *Smith*, 1 *S. B.*, 389. In *Valpy* v. *Oakely*, 16 *Q. B.*, 941; 20 L. J., Q. B., 380, where the vendor stopped delivery of goods sold, the vendee having become insolvent, the court did not hold the contract rescinded, but that the assignees of the bankrupt were entitled to recover in assumpsit the value of the goods, less the unpaid price, that is, merely nominal damages, unless the market had risen.

In *Griffiths* v. *Perry*, 1 *E. & E.*, 680; 28 L. J. Q. B., 204, a like case of refusal of delivery, the Court held that the vendor's right was like that of stoppage *in transitu*, (that is to say, that the vendor need not go through the idle form of putting the goods into a cart and then taking them out, but had the right to retain by a quasi stoppage *in transitu*);" and gave the assignees of the bankrupt nominal damages for the vendor's stoppage of the delivery.

Courts of Equity have assumed jurisdiction of bills filed by vendors to assert their rights of stoppage *in transitu*, a jurisdiction totally incompatible with the theory of a rescission of the contract; for if the contract were rescinded, there would be no privity in a Court of Equity between the parties. In *Schotsman* v. *The Lancashire and Yorkshire Railw. Co.*, *L. R.*, 2 *Ch. App.*, 332, Lord *Cairns* and Lord *Chelmsford*

declared they entertained no doubt of the jurisdiction of a Court of Equity, in the case of a bill filed to enforce the vendor's right of stoppage.

Admitting that the bill of lading became valid by the shipment, when that was made, and that it operated to create a lien in favor of Cole Bros., and on their endorsement of it, and acceptance of the draft by Hamilton & Dunnica, in favor of the latter, it certainly created no *more* than a lien. It did not transfer the proprietorship of the corn to Cole Bros., nor when the draft and bill of lading came to Hamilton & Dunnica for acceptance of the draft, and they *did* accept, did they become proprietors. The corn still remained the property of Sherwood, Karns & Co.; and, as we have seen, all the rights of Halliday Bros. continued, that were consistent with and qualified that proprietorship, so long as the corn was in the possession of the carrier, on its way to its destination. Theirs was the greater and higher lien, as we have seen. Only the carrier's, for the freight, was superior to it; and their lien was as valid against Cole Bros. and Hamilton and Dunnica, as it was against the original vendees.

Admitting that the delivery of the bill of lading to Cole Bros. gave them a lien on the corn, for the sum advanced by them, and that this lien passed to Hamilton & Dunnica by the transmission to them of the bill of lading, (which of course was given them or held for them, on their accepting the draft), and that, upon accepting, they had a lien also for their commissions for accepting, and for the freight paid by them, still they had but a lien, and a *special* property in the corn to support and secure it.

When the bill of lading is transferred as a pledge or security for the debt, the *property* in the goods, in general, remains in the vendee; but even if by agreement, the *property* in the goods has been assigned, as well as the possession, it is only a *special* property that is thus transferred, and the *general* property remains in the vendee. The true nature and effect of the remedy by stoppage *in transitu* is, simply to restore the *possession* of the goods to the vendee, so as to enable him to exercise his rights as an unpaid vendor; and the contract of sale is not rescinded. *Benjamin*, 660, 1 *Smith's Leading Cases*, 748. If the vendor had delivered the bill of lading to the vendee, and thus enabled him, by having it in possession, to obtain credit and an advance upon it, the creditor of the vendee, to whom the bill of lading was transferred as security, would be entitled to be first satisfied out of the

proceeds of the goods, the vendee being entitled to the surplus only; but he would have the further equitable right of insisting on marshalling the assets; that is to say, of requiring the creditor to exhaust any other securities held by him, towards satisfying his claim, before proceeding on the goods of the unpaid vendor.

In re Westzinthus, 5 *B. & Ad.*, 817. *Spalding* v. *Ruding*, 6 *Beav.*, 376; 15 *L. J., Ch.* 374. *Benjamin*, 659.

But in the present case, Halliday Bros. had nothing to do with the bill of lading. They did not, nor did their agent at St. Louis, obtain it and deliver it to the vendees, or even know that it had been given. The agent had simply given an order in favor of the carrier, for account of the vendees, to receive the corn for carriage to its destination. It is fair to presume that he knew it was to be forwarded to New Orleans, the Bee and barges being then in port at St. Louis. This order had not one of the characteristics of a bill of lading, and was not delivered or shown to Cole Bros., or sent with the draft to New Orleans. Halliday Bros. had not even enabled Sherwood, Karns & Co. to obtain a bill of lading, on which they might obtain credit, and the discounting of a draft accompanied by it; for the corn was not at St. Louis, and no lawful or true bill of lading could be given for it. Cole Bros. *perhaps* bought the draft upon the supposition that the bill of lading was true, and that the corn had been delivered by the vendor. But it had not been, and the bill of lading was mere waste paper. It did not become true, or a valid document, when the corn *was* shipped, at another place, several days afterwards. If a new and true bill of lading had been then taken, *it* could have given Cole Bros. no lien, for a loan made several days before. If the date and statement of place in the bill given at St. Louis had then been changed, to make it state the truth, it would have appeared that there had been no delivery of the corn, when the draft was cashed. In effect, therefore, Cole Bros. cashed the draft without any collateral security whatever; and the subsequent delivery and shipment could not *relate*, in order to benefit them, or so as to injure Halliday Bros.

Therefore, Cole Bros. had no lien on the corn, or special ownership of it, which they could transfer to Hamilton & Dunnica; and *their* lien only commenced when they accepted the draft. If, before that, the drawers had been divested of their property in the corn, by an attachment, or a special

lien created thereby, Hamilton & Dunnica were not benefited by their ignorance of this procedure. That ignorance could not affect the rights of Halliday Bros. It could no more make a lien in favor of Hamilton & Dunnica, upon their subsequent acceptance, than if the corn had been sunk in the Mississippi and utterly destroyed. Their ignorance was their misfortune, as it would have been if a storm had wrecked the barges and destroyed the corn.

The right of stoppage is based on the plain reason of justice and equity, that one man's goods ought not to be applied to the payment of another man's debts. If the vendor furnishes the vendee with a bill of lading, and thus enables and *helps* him to obtain credit upon shipment of the goods, then it would be unjust and inequitable for him to secure himself and prevent payment of the moneys the advance of which he had thus encouraged. If no such equitable estoppel exists, no third person can have any more rights against him than the vendee had. In the absence of such equity, the maxim of the Roman law applies—"*Nemo plus juris in alium transferre potest quam ipse habet.*" *L.* 54. *ff., de reg. jur.* As to all acts done by the vendee, for which the vendor is entirely irresponsible, the maxim applies, *Nemo ex alterius facto prægravari debet.*

Certainly, Halliday Bros. continued to be owners of the property, with no charge upon it, until the time when it was to be delivered. Sherwood, Karns & Co. had no right of possession *until* then, and would not have had it then, but for the agreement that they were to pay for it at St. Louis, afterwards, as soon as the weights were reported. On the 4th of September they were insolvent, and made default by failing to pay on demand, and Halliday Bros. had a right to resume possession, *for no lien had then accrued.* The corn was at their risk, until actually received by the carrier. Until then, Cole Bros. could have no lien on it, and then they obtained none, because they had no true and valid bill of lading for it. If they had discovered the fraud perpetrated on them by Sherwood, Karns & Co., they could have attached the corn for their debt; but, in the race of diligence, Halliday Bros. were foremost, and were entitled to keep the advantage they gained by the lien created by their attachment, in aid of their lien as vendors, and right of stoppage in transitu to enforce it.

In fact, there was no sale, until the corn had been

weighed and delivered to the carrier. So the English law is, as we have seen; and the rule of the Roman law was the same: *Si id quod venierit appareat quid, quale quantumve sit, et pretium et puré venit; perfecta est emptio. L.* 8 *de peric et Comm. r. vend.*

And Pothier says, (*Contrat de Vente*, Part IV, No. 309,) that if the sale is of things that consist *in quantitate*, and which are sold by weight, number or measure, the sale is not perfect until the articles are measured, weighed or counted. The *engagements* of the contract subsist before that, but the property remains at the risk of the vendor, for, until the goods are measured or weighed, *non apparet quantum venierit.*

Nemo dat quod non habet. Sherwood, Karns & Co. had, on the 31st of August, no right of property or possession or any sort of right whatever in the corn. They could not create in Cole Bros. on that day, any lien or interest or charge upon it; and, *in the absence of a valid and true bill of lading*, no lien or charge could be created on it afterwards, in their favor, as against a subsequently attaching creditor, by a merely verbal understanding. There is no proof of any express *agreement;* and if there had been one, before the receipt of the corn, to the effect that when it *should be* received, Cole Bros. should have a charge on it, this would have amounted to nothing against an attaching creditor. *Traditionibus, non nudis conventionibus dominia transferuntur*, (L. 20, *Code de Pact.*), and the accessory cannot come into being before the principal exists.

The consignee of goods under a bill of lading is *primâ facie* the legal owner, and may sue the carrier for their non-delivery. *Lawrence* v. *Minturn*, 17 *Howard*, 100. The putting of goods on board a vessel, and transmitting bills of lading, vests the property in the consignee, though the bills of lading should not arrive. *Low* v. *Andrews*, 1 *Story*, 38.

It is, of course, on this ground of transfer of the ownership of the corn, that the suit of Hamilton & Dunnica rests. But a bill of lading for corn shipped at St. Louis, acknowledging it to have been received *there*, will not give the right of property, when transferred, to a quantity of corn shipped some days afterward, at a place 150 miles distant. It seems to us that Hamilton & Dunnica would have to look for the corn that was shipped at St. Louis, and can have no claim on that shipped at Price's Landing. Somebody, it is evident,

was to be defrauded. The insolvent firm was swift to procure a bill of lading, that on it they might get, by discount of their draft, nearly the whole price of the corn, and make use of the money, when obtained, for their own uses, instead of paying it over to Booth Sons, for Halliday Bros., to whom it belonged. If Halliday Bros. have, in any way, not unfairly, obtained the legal advantage they are entitled to the benefit of it; and if Hamilton & Dunnica are defrauded, it has been by means of the trick played by Sherwood, Karns & Co., in obtaining and fraudulently using a bill of lading that was false, for the purpose of putting the property of Halliday Bros. beyond their reach, and making their consignees owners of it, without payment of a dollar of its value.

When Hamilton & Dunnica succeed in finding the corn shipped at St. Louis, let them lay claim to it; or, if none was shipped there, let them resort to Cole Bros., to whom they paid the draft on the faith of a false bill of lading.

The effect of a consignment, unexplained, is to vest the property in the consignee, and an endorsement and delivery of the bill of lading amounts to a transfer of the property, subject to the consignor's right, if any, of stoppage *in transitu*.

In this case there is no evidence that any advices were ever sent to Hamilton & Dunnica, in regard to the corn, otherwise than by the draft or bill of lading. There is no evidence that any sort of advice was ever sent them of any shipment from any port except St. Louis. They accepted on the faith of that alone, on the faith of the bill of lading alone. They could have no claim on the corn, shipped at another time, and from another and a remote port, either for the money paid on the draft, or for moneys previously owing to them, if there were such, by Hamilton & Dunnica. Such previous indebtedness could give them no right except to *retain*, after the property had come to their hands. And it does not appear that, at the time of the shipment, Sherwood, Karns & Co. *were* indebted to them; on the contrary, their account shows a balance the other way, at that time.

A factor, it was held in *Nesmith* v. *Dyeing &c. Co.*, 1 *Curtis* 131, who accepts a bill drawn against a particular consignment of goods, placed in the hands of a third person for delivery to him, thereby acquires a property in the goods, which will enable him to maintain replevin. But in this case the corn was not placed in the hands of a third person,

as agent or bailee of the vendees, to be delivered to them, but it was put in charge of a carrier, to be conveyed to its destination, the price being payable forthwith. The two facts, without others, of the delivery of the corn to the carrier, and the drawing and acceptance of the draft, did not transfer the property to Hamilton & Dunnica, for they accepted on the faith of a bill of lading for corn shipped at St. Louis, at a time when Sherwood, Karns & Co. had neither right of possession nor property, of the corn afterwards shipped.

The learned counsel of Halliday Bros. below have furnished us with the following argument, of which we gladly make use:

IV.

In order to sustain this action, Hamilton & Dunnica must *prove* either a general or special property in the corn at the time of the alleged trespass and conversion.

1 Chitty. Pl. side pp. 170 and 194, 7th Am. Ed.

We deny that they had *either*, at that time.

1. The corn was attached September 5th. The draft drawn on the shipment with bill of lading attached, and which Cole Brothers cashed, was kept by them at St. Louis, until September 4th, when it was deposited in the bank at that place for collection, and by that bank afterwards sent by due course of mail to the bank at New Orleans. The evidence fails to show *when* it was sent, or *when* Hamilton & Dunnica accepted it, but the court will take judicial cognizance of the fact that it was morally impossible for it to have reached New Orleans by the time the corn was attached, September 5, even if forwarded on the *morning* of the 4th. At the time that this corn was attached, Hamilton & Dunnica had not received the bill of lading, or accepted this draft thereto attached. The burden of proof was on *them* to show it, if they had done so; and Dunnica could have so stated, if it had been the case. They never *paid* the draft until September 23d, as shown by their own account. Exhibit "C."

2. There is no proof that Hamilton & Dunnica even so much as knew of the existence of *this* corn *or* bill of lading *or* draft, at the time of the attachment, or of the intention to ship the former, or draw the latter—no proof that they had *agreed* to make advances on *that* corn, or accept the draft

drawn on *that* shipment—no proof that Sherwood, Karns & Co. had *promised* to ship, or Hamilton & Dunnica were *bound* to accept the draft.

The evidence simply shows that Sherwood, Karns & Co. had been "*in the habit*" of shipping produce to Hamilton & Dunnica, and Hamilton & Dunnica had been *in the habit* of paying drafts drawn on such shipments, that there was still an open account between the parties, and that there was an understanding between the parties that whenever Sherwood, Karns & Co. *did* ship corn to Hamilton & Dunnica, the surplus, over and above special drafts or advances on such shipment, should be placed to Sherwood, Karns & Co.'s credit on account, &c. *Sherwood, Karns & Co. may have* "understood" and supposed that the "entire proceeds" of *this* shipment, "were, like its predecessors, to be placed to our (Sherwood, Karns & Co.'s) credit on current account, and the draft to be paid;" (see testimony of Karns, *Rec.* 12,) but there is no warrant in the whole evidence for saying that there was any *previous* understanding or agreement between Sherwood, Karns & Co. and Hamilton & Dunnica, *that the draft in question* should be first paid out of the proceeds of this corn and the balance of that shipment go *to pay* past *indebtedness* of Sherwood, Karns & Co. to Hamilton & Dunnica. In fact *Hamilton & Dunnica* could have had no such understanding, when they neither *knew* of the shipment or the draft, until after the attachment.

We insist that it is not sufficient, that the consignors had been in the *habit* of shipping and the consignees in the *habit* of advancing, and that there was a *general* understanding between them that whenever the consignors thought proper to ship and *did* ship produce to the consignees, they should sell the corn, pay whatever draft might be drawn on and accepted by them, and credit balance of proceeds to account of consignors, &. But there must be a special promise and agreement on the part of consignors to make *the particular shipment in question*, a special previous appropriation of *that special cargo and* an actual acceptance and consent thereto on the part of the consignees. There must be some obligation on the part of consignors *to ship*, and some obligation on the part of consignees to accept draft, *or* an actual acceptance of the draft, at the time the rights of attaching creditors become vested by actual seizure. Where consignees have no knowledge of the intended shipment, and so long

as they have made no promise—done nothing—on the faith of that shipment, they can have no lien. It is absolutely essential that consignees should have knowledge that *the cargo in question* was intended to be consigned to them, and that they should have done some act on the faith of that particular consignment (at the time they allege the lien existed) by reason of which they would be injured if such lien were denied them. (See authorities hereafter cited.)

This evidence of Cole, taken in connection with that of Karns, (*Rec.* 30,) shows conclusively that as respects the advances made by Cole Bros. on the corn in question, it was an individual matter of their own—made with *their own money*, and on *their own responsibility*. They "*bought*" the draft as "any other banking house" might have done, and *not* as agent for Hamilton & Dunnica. This question of agency is not involved in the case; and up to the time of the attachment, *Hamilton & Dunnica* had not advanced a dollar by themselves or their *agents*, upon the faith of this shipment of corn, nor agreed to advance, so far as the evidence shows. Cole Bros. may have purchased or "bought" the draft on the faith of the shipment, and paid out $2,480 of their *own money*, expecting that when their St. Louis bank sent the same to the New Orleans bank for collection, Hamilton & Dunnica would accept and pay it. Until Hamilton & Dunnica did accept and pay it, they at least made no advances on the faith of this shipment of corn.

4. At the time the attachment was levied, there had been no delivery of the corn to Hamilton & Dunnica, actual, symbolical or constructive. Sherwood, Karns & Co.'s right of stoppage *in transitu* certainly existed. "*Qui facit per alium facit per se*"; and therefore a delivery by the vendor to any agent who is *authorized by the vendee*, is a delivery to the vendee; while it is equally true that a delivery to any agent who is authorized by the *vendor* is *no delivery whatever as respects the vendee*. *Bateman on Com. Law*, 181, *Sec.* 265.

In the present case, there is not the least evidence tending to show that the carrier (Bee and barges,) was "authorized by" Hamilton & Dunnica, who certainly could stand in no better position, as factors, than "a vendee." On the contrary, the Bee and barges was a carrier of Sherwood, Karns & Co.'s own selection, *their* own chosen agents to transport this corn. The very nature of the hasty purchase, bill of lading and pretended shipment at St. Louis, on the

31st of August, 1867, *before even Sherwood, Karns & Co. had acquired title to the corn by delivery*, forbids the idea of the Bee and barges being the agents *authorized* by *Hamilton & Dunnica* to receive and carry this corn to them.

5. The bill of lading was not endorsed (at least there is no evidence that it was), nor is there any pretence of a *sale* of the corn by Sherwood, Karns & Co. to Hamilton & Dunnica. Sherwood, Karns & Co. owned the corn by purchase from Halliday Bros. August 31st, and delivery to *their* carrier, September 4th or 5th; (Hill says, Rec. 9, he thinks the corn was put on Bee and barges, September 2d or 3d, and the corn was attached September 3d or 4th; *but the attachment writ, Rec.* 19, shows seizure September 5th) and shipped it to Hamilton & Dunnica, as their factors, to be by them sold, and (says Sherwood, Rec. 12) "the entire proceeds placed to Sherwood, Karns & Co.'s credit on current account," &c.

6. If then, at the time of the attachment, September 5th, there had been no sale of the corn to Hamilton & Dunnica; and if there had been no delivery of the corn to Hamilton & Dunnica or any carrier authorized by them; and if Cole Bros. "*bought*" the draft in question with their *own money*, on their own responsibility, like "any other banking house" and not as agents of Hamilton & Dunnica; and if Hamilton & Dunnica had neither received the bill of lading nor accepted the draft; and if they had no actual knowledge of draft, bill of lading or shipment of corn; and if there was no previous understanding or agreement that *this* corn *was* to be shipped and advances *would* be made on it, (and nothing to the contrary *is* proven by the evidence) then most assuredly Hamilton & Dunnica had no property general or special in the corn when it was attached, notwithstanding Sherwood, Karns & Co. had been "*in the habit*" of shipping produce to Hamilton & Dunnica, &c.

See authorities hereafter cited: also, 2 *Pars. Cont.*, 94, 98, & 292, *5th Ed. Brandt* v. *Bowlby* 2. *B & Ad.*, 932. *Coxe* v. *Harden*, 4 *East.*, 211. 3 *Pars. Cont.*, 261, *5th Ed.*

7. It might be that Cole Bros., by virtue of *their* advances on the faith of the bill of lading, had a special property, a lien on the corn; but Hamilton & Dunnica certainly had none until they accepted the draft. They were at liberty to refuse "acceptance" at the time the corn was seized on attachment, and might have done so. Their *subsequent* accept-

ance ought not to vest in them a lien, that they had not, when the rights of a *bona fide* attaching creditor (on account of the unpaid purchase money for that same corn) attached. As between Sherwood, Karns & Co. and Hamilton & Dunnica the alleged lien might be good, but it is different as to Halliday Bros. *They* knew nothing of the alleged lien of Hamilton & Dunnica when they attached—the corn was still in the possession of Sherwood, Karns & Co.'s carriers—there had been no acceptance of the draft or delivery of the bill of lading so as to amount to even a symbolical delivery to Hamilton & Dunnica. It was a mere race between creditors and Halliday Bros., being prior in point of time, ought to hold the corn.

8. The whole transaction as shown by the evidence, as respects Hamilton & Dunnica, seems to us to be wanting in those essential characteristics which are necessary to give to a factor a lien without actual possession. In *nearly* all, if not in *all* the cases where such lien has been held to exist, there was an *express previous* agreement *to ship* the identical cargo in question, *proven*—a distinct pledge of the proceeds of *that* cargo to the payment of *actual* advances—and actual advances made in pursuance of such agreement by actual payment or acceptance of draft *before* the rights of third parties attached. In the present case no previous *agreement* to ship *the corn in question* is proven. No knowledge even of such intended shipment on the part of Hamilton & Dunnica is shown—and no advances had been made or agreed to be made even, or draft accepted, when Halliday Bros. attached. We respectfully submit that Hamilton & Dunnica had no lien for any amount as against Halliday Bros.; that this action cannot be sustained, and a new trial ought to have been granted, the verdict for any amount being contrary to law and the evidence.

(See authorities hereafter cited.)

V.

Even if the facts proven in this case are deemed in law sufficient to warrant the jury in finding a special property and lien in Hamilton & Dunnica to the amount of the draft, as actual advances made on the faith of the shipment in question, yet they certainly had no lien beyond the actual

advances made on the faith of *that* shipment—they had no lien for *a general balance due on account of past indebtedness.*

That a factor may have a lien or special property in goods consigned to him by his principal, where the factor has *actually* made advances or signed acceptances upon *the faith* of such consignment, even before the goods come into the actual possession of the factor, is undoubtedly the law, upon the ground that the *delivery* of the bill of lading or a *prior agreement to ship*, and the actual shipping of the goods *in pursuance* of such agreement, *together with* the advances, or actual acceptance made by the factor upon *the faith* of that consignment, amount in law to a *symbolical* delivery of the property itself. "Though a factor's lien depends upon *possession*, he may *by special arrangements* be a consignee and thus acquire rights prior to the possession of the property, but the arrangements must amount to a *specific* appropriation of *particular* property *already* consigned"—says Parsons on Contracts, vol. 3, 261, 5th Ed., after collating all the authorities in note (*w*) on same page. But that, as against attaching creditors, the factor has a lien upon a particular consignment *for a general balance due on account of former shipments*, seems to us contrary to general principles and the reasons of the law, and against the plain weight of authority. 4 Comstock, 497. 1 Curtis, 130. 1 Bosanquet & Puller, 563. Bateman's Coml. Law, 181. Holcombe's leading cases upon Coml. Law, 56, 65. 1 Peters, 387. Brown's cases in Parliament, 47, Fargubarchals v. Craig. Parsons on Contracts, iii, 261, 5th Ed.

The general principle running through *all* the cases where liens of factors have been recognized, is well expressed by Redfield, C. J., in Davis v. Bradley, 28 Vt., 118. He says:

"These incidents must concur: *First*, the consignment must be in terms to the factor. *Second*, but to the conclusiveness of such a contract, *against creditors and subsequent purchasers*, it is requisite that the consignee should have made advances or acceptances upon the faith of *these particular* consignments."

If *this* be the *true* doctrine, (and we think it *is* so laid down in nearly all the adjudicated cases,) then how can the lien be extended so as to include a general balance due on account of past dealings having no connection with the particular consignment in question. It may be that Hamilton & Dunnica accepted the draft on the faith of the shipment

of corn, although *after* Halliday Bros. had attached; but it surely can not be contended that the general balance that Sherwood, Karns & Co. owed Hamilton & Dunnica on account of previous dealings between the parties running through a period of two years, were in any just sense "advances made upon the faith of *this particular*" shipment of corn, the very existance of which was undreamed of when those previous dealings were had.

To this we add, that we think the court below went a good way, in applying to this case the law in regard to the right of factors and others to *retain* goods, credits, proceeds, &c., *actually* in their hands, for their general balance.

The law as to the right to retain is very clearly stated by Lord HARDWICKE, in *Ex parte Deeze*, *Atk.*, 228, thus:

"Notwithstanding the rules of law as to the bankrupts reduce all creditors to an equality, yet it is hard where a man has a debt due from a bankrupt, *and has at the same time goods of a bankrupt in his hands, which cannot be got from him without the assistance of law or equity*, that the assignee should take them from him without satisfying the whole debt."

Therefore the clause in the bankrupt act, as to mutual credit (5 *Geo. II*) has received a very liberal construction.

"To be sure packers may *retain goods* till they are paid the price and labor of packing, and so other trades may *retain* in the like manner, therefore, these goods were in the petitioner's hands, *in the nature of a pledge*, for some part of his debt, that is, the price of his packing; and what right has a court of equity to say that if he has another debt due to him from the same person, *the goods shall be taken from him* without having the whole paid?"

No doubt such right of *retainer* extends to the *whole* property or fund. *Story, Agency*, § 372: 2 *Kent Comm.*, 640. It fastens on securities, and secures advances made, and against responsibilities incurred, in the direct line of an agency, as to cases of suretyship. Story, Agency, §§ 355, 356, 338, 368. *Banks* v. *Levy*, *McMillan*, 436. *Kruger* v. *Wilcox*, *Ambler*, 252. *Drinkwater* v. *Goodwin Cowp.*, 250. *Brander* v. *Phillips*, 16 *Peters*, 129.

The convenience of commerce and natural justice are on the side of liens; and the courts lean that way, where it is

implied, from the usage of trade, or from the manner of dealing between the parties, or where the party is a factor. *Green* v. *Farmer*, 4 *Burr.*, 2221.

In *Hodgson* v. *Payson*, 3 *Harr. & Johns*, 341, the court said: "If upon general balance of account, they had been indebted to Payson, there could be no doubt, in principle, or on authorities, of his right to *retain*; and the right (supposing the balance so due), would be the same, whether the property in his hands consisted of money, goods, negotiable paper, or other evidences of debts." The lien extends to engagements of the factor by which he is bound, and for which he must afterwards be a debtor, &c.

Livermore says: "The law gives the agent a qualified right over the property of his principal, *in his possession, to hold it* until payment is made of what he is entitled to receive." 2 *Liverm.*, 34.

In *Vowell* v. *West*, 4 *Cranch C. C.*, 100, the question being as to right of a supercargo to retain, there having been an assignment of the cargo for the benefit of creditors, the court said:

"He was the factor of the Harpers, and if the outward cargo *had remained in his hands*, at the time of the notice, he would have had a lien upon it, for his general balance, in case of the insolvency of his principal; *à fortiori* he had a right to set off the debt due from them to him, against the debt due from him to them."

A factor has a lien on the property of the principal, *in his hands*, for all advances made, and for any balance that may be due. The lien, also, exists for *responsibilities* incurred by the factor for the principal, in the general course of their business, *and this is especially the case* where the principal is insolvent, and the liability of the factor is about to be enforced." *Matthews* v. *Meaedger*, 2 *McLean*, 153.

"A factor may *retain* goods or their proceeds, for balance of his general account. And it is further settled that this lien applies not only for the amount of money actually disbursed for the necessary use *of the property on hand*, and for acceptances actually paid, but for the amount of outstanding acceptances not then due. The factor may *retain the goods or the money* into which they have been converted, until he is indemnified against the liability to which he had subjected himself.

"This is very equitable doctrine, especially when the ac-

ceptances and responsibilities were assumed, or are *necessarily presumed to have been assumed*, upon the credit of the property *in his possession*. *Bradford* v. *Kimberly*, 3 *Johns. Ch. R.*, 434.

Bankers have a general lien on all securities *in their hands*, for their general balance, unless there be evidence to show that any particular security was received under special circumstances, which would take it out of the common rule. *Davis* v. *Brewster*, 5 *T. R.*, 491. *Crandao* v. *Barnett*, 12 *Clark & Finn.*, 806.

This is part of the established law of the country, and the Courts will take notice of it. It need not to be pleaded nor given in evidence. 12 *Clark & Finn.*, 810; *Per* Ld. LYNDHURST.

"The question is whether under the circumstances of this case, the bankers had not a lien upon all the paper securities *in their hands* for the amount of the general balance. The evidence goes to show that they had, *according to the general dealing and understanding between the parties*." GROSE, 5 *T. R.*, 492.

To sustain a banker's lien, there must be a credit given upon the credit of the securities, either in possession or expectancy. *Russell* v. *Hadduck*, 3 *Gilman*, 238.

"It amounts to a consent by the bankrupts, that the money produced by the assignments should pass through the defendant's hands. In that case, he would have a right to deduct from it the debt due to him. *And that right might be the ground* for his permitting the bankrupt to be and to remain in his debt." Per BAYLEY, *Easum* v. *Cato*, 5 *B. & A. W.*, 867.

If a person entrusted with value, trusts his creditor with that which may become productive of value, the first becoming bankrupt, the second may retain his debt out of the proceeds of the thing entrusted to him, and only pay the balance. *Olive* v. *Smith*, 5 *Taunt.*, 57.

The general principle is that whenever each party has trusted the other with the possession of value, the assignees of either, he becoming a bankrupt, *cannot withdraw that value from the other, but on the terms of paying* the defendant *what is due between them*. GIBBS, J. *below*. *Id.*

"Lien of bankers on securities of customers exists by the general custom of trade constituting the law-merchant, and need not be pleaded; for the court takes notice of that which constitutes the law-merchant. And we agree in this view

of this case." *Barnett* v. *Crandao*, 6 *Mann. & Grang.* 665; Per Lord DENMAN.

In cases of lien, the special property must prevail, even against the owners, until such lien be discharged. Defendant being agent and factor of F. and of S., his assignee, after assignment, was under liability on account of his contract with F., to a very large amount. The court said, "We think that by the general principles of law, he had a right *to keep possession* of *all* the goods purchased, until he reimbursed his advances *and secured* against *his liabilities*." *Stevens* v. *Robins*, 12 *Mass.*, 182.

Where lenders or other brokers hold securities *deposited by the same borrowers* at several times and on distinct transactions, and choose to close their account, or their account is closed by circumstances, such as the borrowers stopping payment, the lenders have a lien upon all the borrowers' securities in their possession, until the balance due to them from the borrowers on every account is paid. In fact, all securities *in the hands of the lender* at the time of closing an account are applicable, not only to the particular sum advanced at the time of deposit of particular securities, but to whatever balance may be due from the borrower to the lender at the time that the account is closed. The court would require no evidence of the practice of brokers in this respect, considering it as settled. Sir WILLIAM WOOD, V. C., *Jones* v. *Peppercorne*, 5 *Jurist, N. S.*, 140.

Whenever the relation of principal and factor exists, the right of lien attaches to secure all advances made or *liabilities incurred* in the course of his business by the factor. *Bryce* v. *Brooks*, 26 *Wend.*, 367.

There were sales matured and moneys advanced, and also unmatured sales and unmatured notes and acceptances given by way of advances.

"For these notes and acceptances, the judgment creditors had a lien on the goods, and of course on their proceeds. Was it not therefore, legal, as well as just and equitable, that the money arising from the sales should be applied, as it became due, in satisfaction of the advances the judgment creditors were obliged to make in payment of the notes and acceptances as they fell due? The application was so made; and I have no doubt that it was in accordance both with the usage in such cases, and with law." *Bradley* v. *Richardson*, 3 *Blatchford*, 358.

Where there is a trust between two men, on each side, that makes a mutual credit. *Assignees of Cox* v. *Fenn.*, *Cooke, Bank. L. 5th Ed.*, 554.

Wherever one party, being indebted to another, intrusts that other with goods, it is a case of mutual credit. *Per* Lords MANSFIELD & BULLER, *Id.*

The doctrine of mutual credit will cover all the cases of lien, and also goes a great deal further. *Per* GIBBS, J., 5 *Taunt.*, 60.

In *Parker* v. *Carter*, (*C. P. Trin.*, 1788,) *Cooke, Bank. L., 5th Ed.*, 567, the defendants contended they had, as policy brokers *and general agents* of the bankrupt, a right *to retain the whole money received* from the underwriters, towards payment of the general balance due to them, and not merely, as was contended by the plaintiff, for the charge of the insurance; and the court were of that opinion.

We do not find, in any of these cases, any warrant for the doctrine that upon a shipment of goods to a factor for sale, and the drawing a draft against the shipment, a lien is at once created in favor of the factor, not only for the amount of the draft, if he accepts it, but also for any general balance which the shipper may owe him.

Such a doctrine would have very villainous consequences, if a vendee failing to pay for the goods upon a cash sale, not even shipping them at once, could, upon obtaining a false bill of lading, and drawing against the *intended*, *future* shipment, cheat the vendor out of the price, and this not only to the amount of the draft drawn, but of whatever sum he might owe on other accounts, to his factor and consignee.

The same learned counsel have also furnished us the following points and specific conclusions.

I.

1. Whether Halliday Bros. are held guilty of a *conversion* under the count in *trover*, or of a *trespass* under the count in trespass, their action was certainly unattended with any circumstances of aggravation, and predicated upon an honest and *bonâ fide* desire to obtain from Sherwood, Karns

& Co. payment for the corn they had sold them; nor does the declaration allege *special* damages. This being the case, Hamilton & Dunnica's compensation should be awarded on fixed legal principles, and not at the discretion of a jury. The general and best established, as well as the most *equitable*, rule in such cases, is:

"*The value of the property converted, at the time of the conversion, where the plaintiff is the absolute owner; and "merely the amount of the plaintiff's interest therein where he brings his action by virtue of special property, as for instance a lien, and the value of the goods exceeds the lien,*" the defendant being as in this case entitled to the residue by virtue of an attachment against the general owner.

Sedgwick on Meas. of Damages, 3d ed., ch. XIX, side pages, 473, 474, 475, and 480, 481, and 482. Arrowsmith v. Gordon, 3 La. Ann. R., 105. Badills v. Tio, 7 La. Ann. R., 487. Kennedy v. Whitwell, 4 Pick., 466. Pierce v. Benjamin, 14 Pick., 356. Lillard v. Whitaker, 3 Bibb, 92. Watt v. Potter, 2 Mason, 76. Ingersoll v. Van Bokkelin, 7 Cow., 670. 1 Chitty's Pldgs., side pages 167 and 168, 7th Am. ed. 2 Greenleaf, Ev., sec. 272 and 649, 3d ed.

2. The true *value* of the goods is what they were worth at *the place of the conversion*, and *not* what they are worth at some foreign port, or what they *might* have been "sold for" at such port had they, *per chance*, reached there in safety, good order and condition, on or before a certain day.

See authorities above cited.

3. If the value at such foreign port *is* the true criterion, merely because the goods were *destined* for that port, and *might* have arrived there, in spite of the perils of navigation, damaged or undamaged, and been received by the owner *upon payment of freight and charges*, and sold at a profit over and above their cost and worth at the place of shipment or conversion; then it is but just that the freight, commissions or sales, &c., should be deducted from the value at such foreign port; otherwise the owner obtains the value of his goods at such foreign port without the payment of the freight and extra charges necessary to make the goods bring the enhanced value at that port; and thereby receives not "*compensation*," but a "*profit*" from the conversion and trespass.

4. There is not one sinctilla of evidence in the whole record tending to show the value of the corn in question *at*

Cairo, Illinois, where the conversion and trespass, if at all, took place, either at the time of the conversion, before or since, except the return of the Marshal (Record: original, pages 62 and 63; print. pages 23 and 24) showing a sale of this corn at public auction at Cairo, for $2,266.26, March 27, 1868; and *this* was no criterion of its value when seized six months before. The verdict and judgment below for $3,436.24 was therefore "not supported by the evidence." In fact, there being no evidence of value at Cairo, the jury were limited to *nominal* damages, if any.

5. There is evidence in the record showing the price of corn in *St. Louis, Mo.*, August 31st, some four days *prior* to the alleged trespass and conversion at *Cairo, Ill.*, and there is some evidence *tending* to show the probable value at New Orleans about that time, or the *expected* profits from the shipment; but the *only* evidence as to the value of the corn at the time of the conversion is that of the plaintiff, John L. Dunnica, corroborated by his clerk Harrison, viz: "At the time the corn *would* have been ready *for sale* after its arrival in New Orleans, it *could* have been sold at $1.30 for white, and $1.25 per bushel for yellow!" We submit that *this* does not establish the real *value* of the corn even at New Orleans, when it *would* have *arrived* there, even if we concede that Dunnica, (who never saw that corn and could not tell in what condition it *would* have arrived;) *knew* that he *could* have sold *this* corn at the prices named by him, *after* he got it "ready for sale."

Admitting, however, that this evidence is sufficient, yet the verdict of the jury was excessive and not warranted by the *law* and evidence. There were 1200 sacks of yellow and 50 sacks of white corn—in all 2,666.19 bushels—attached, (See Record, original, p. 62, print, p. 23) which, at $1.30 per bushel would be $3,466.40. *To say nothing of the* 2½ *per cent. commissions* charged for selling, (*Record* 33) *&c.*, the freight alone, (*see bill of lading, Record*, 14,) which consignees were *relieved* from paying by reason of carrier's failure to deliver at New Orleans, (see 2. *Parsons Cont., p.* 293, 5th *Ed., and Brittan* v. *Barnaby*, 21 *Howard*, 527,) and which the officer attaching was bound to pay carrier before he could lawfully attach, at the rate of 35 cents per sack, would amount to $437.50, which sum, (necessary to have been paid in order to realize said sum of $3,466.49) should by every just rule of "*compensation*" have been deducted, thus

leaving the measure of damages $3,028.90, and even if we added to this sum legal interest from date of *trespass* to date of verdict, the sum total would be but $3,256, and *not* $3,436.24, as found by the jury. The verdict was therefore unsupported by the evidence and a new trial ought to have been granted, even if Hamilton & Dunnica had been the *absolute* owners of the corn.

II.

1. Halliday Bros. were not liable for the torts of the marshall of the city of Cairo, unless done by the previous command, or with the subsequent assent, adoption or ratification of Halliday Bros.

Story on Agency, sec. 455.

2. There is no evidence in the record, we respectfully submit, which shows that Halliday Brothers authorized or commanded the marshal to seize the corn in question. He was authorized by the writ to seize the property of Sherwood, Karns & Co. and *not* Hamilton & Dnnnica's property.

3. There is no evidence showing that Halliday Bros. ever had possession on or control of the corn, or knew of its seizure, or ratified the act, except the *inference* to be drawn from their receipt to the marshal (Record 24,) viz: "2,014.25 Received, Cairo, Illinois, March 27th, 1868, from John Hogan, marshal of city of Cairo, two thousand and fourteen and 25-100 dollars, amount collected on execution in case of Halliday Brothers against Sherwood, Karns & Co.
Halliday Brothers."

4. No inference of assent and ratification of the seizure of the corn can be implied from the "receipt" in question. It is a mere receipt for so much money, and nothing to show that Halliday Bros. knew that it had been realized from the seizure and sale of Hamilton & Dunnica's corn, or *any* corn.

5. A man can not, by implication, consent to and ratify that which he does not know; and no ratification of the acts of an agent are binding upon the principal *unless made with a full knowledge of all the material facts and circumstances.* Such knowledge is indispensable as a condition precedent to a valid and binding assent and ratification; and it matters not if this want of knowledge arises even by reason of the inadvertency or *neglect* of the principal.

Parsons' Cont., vol. 1, p. 46, note U., sec. 111, 4th Ed., and authorities there cited.

Mathews v. Hamilton, et al 23 Ill. R., 471.
Farwell v. Meyer, et al 35 Ill. R., 52.
Combs vs. Scott, 12 Allen, reported in Am. Law Reg., vol. 6, N. S., p. 563.
Seymour v Myckoff, 10 N. Y., p. 224.
Kent Com., vol. 1, (8th Ed., p. 799, note (1.)
Chitty's Conts. (7th Am. Ed.,) p. 213, top page.
Smith's Conts. (4th Am. Ed.,) p. 390, side page 322.
Story on Agency, sec. 251, and note.

The evidence certainly fails intoto to show that Hallidays knew all the material facts, &c., when they received and receipted for this money, or even knew that any property of *Hamilton & Dunnica's* had been trespassed upon, or that the money in question was the proceeds of such trespass; and the burden of proof was on plaintiffs below to show this.

6. If Halliday Bros. trespassed upon or converted to their own use *any* property of Hamilton & Dunnica, it was *only* the $2,014.25 they received from the marshal, March 27, 1868; and so the verdict for $3,436.24, February 5, 1869, was not warranted by the evidence, even if we concede absolute ownership in Hamilton & Dunnica, or a lien to the full extent claimed.

III.

In the natural course of business and commerce, Halliday Bros.' attachment to recover the purchase-money for this corn, would have been in ample time to have held the corn, had no bill of lading been executed *until* the Bee and barges had actually received the corn. In point of fact and *law* the title to this corn was still in Halliday Bros.—they still had possession and there had been no delivery—at the time this bill of lading and draft were executed and Cole Bros. advanced the money. We insist that the bill of lading was not authorized by the law-merchant, nor by general custom at St. Louis or elsewhere; that it was null and void, and a fraud upon Halliday Bros. at the time the draft was drawn and the advances made. No rights could pass thereby, so as to injuriously affect Halliday Bros. Halliday Bros.' attachment was levied before, in the nature of things, there could have been a delivery of a bill of lading for this corn, had the execution and delivery of the bill of lading been postponed until there was an actual delivery of this corn to the

bill of lading *or* the goods have been received by the factor. Both of these instructions construed the law of this case, and stated the facts, liberally, in favor of Hamilton & Dunnica, and, ought to have been given by the court below.

On the other hand, the instructions No. 1, and No. 2, as *given* by the court, did not, we think, correctly state the law of the case, and ought not to have been given. Instruction No. 1 assumes as law, that a mere understanding between a factor and his principal, that the proceeds of a cargo shall, when received and sold, be applied in liquidation of an existing indebtedness, not contracted on the faith of that cargo, gives to the factor a lien the moment the cargo is delivered to the carrier, be that carrier one authorized and appointed by consignor or consignee, provided a bill of lading is taken, and although that bill of lading has never been received by the consignee, and although the consignee never heard of the shipment or bill of lading, or knew of consignor's intention to make the consignment in question. This instruction was also so framed that it was calculated to mislead the jury. Did it refer to a specific "understanding" in regard to the shipment in question, (which consignees had no knowledge of, and therefore could not have an "understanding" about), *or* did it have reference to the general understanding, spoken of by Karns in his evidence, upon which former shipments had been made, but having no specific reference to the consignment in question, and which Sherwood, Karns & Co. were not bound to make, but did make without the knowledge of Hamilton & Dunnica? Instruction No. 2 assumes as law, that the mere shipping of corn to one's factor, *without* any previous understanding, or agreement as to what should be done with the corn and the delivery of that corn the consignor's own carrier, gives to the factor a lien, as against attaching creditors, providing that a bill of lading was taken therefor, a draft drawn on the factor against the shipment, and the bill of lading and draft *delivered* to some *third* party. And *this*, although that draft had not been accepted, and there was no prior agreement *to* accept. We can not believe that either of these two instructions as given by the court, fairly stated the law of the case upon the evidence. It was for the jury to say who employed and authorized the Bee and barges to carry this corn—whose agent the Bee and barges were. A delivery to a carrier appointed by and acting for the consignors, without

the knowledge or request of the consignees, was not a delivery to the factors.

Upon which the case is submitted.

ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 91.

WM. P. HALLIDAY,
HENRY L. HALLIDAY, AND OTHERS,
PLAINTIFFS IN ERROR,

vs.

THOMAS A. HAMILTON AND
JOHN L. DUNNICA,
DEFENDANTS IN ERROR.

In Error to the U. S. Circuit Court, Southern District of Illinois.

STATEMENT AND BRIEF

BY GEORGE P. STRONG,

Att'y of Defts. in Error.

Supreme Court of the United States.

WM. P. HALLIDAY, AND OTHERS,
PLAINTIFFS IN ERROR,

vs.

THOMAS A. HAMILTON AND
JOHN L. DUNNICA,
DEFENDANTS IN ERROR.

STATEMENT AND BRIEF FOR DEFENDANTS IN ERROR,

By GEO. P. STRONG.

On the 31st August, 1867, Sherwood, Karns & Co., a mercantile firm of St. Louis, Mo., purchased of J. W. Booth & Sons 1,250 bags of corn, then lying at Price's Landing, on the Mississippi river, about twenty miles above Cairo. This corn had been placed in the hands of Booth & Sons, for sale, by plaintiffs in error, a firm doing business in Cairo, Ills.

On the day of the sale, Booth & Sons delivered to Sherwood, Karns & Co. an order upon the party in possession of the corn at Price's Landing. This order was delivered to the agent of the Transportation Company, owner of the steamboat Bee and barges, and he issued, on the same day, August 31, 1867, a regular bill of lading of the steamboat Bee and barges for this corn, to Sherwood, Karns & Co., by which the receipt of 1,250 bags of corn was acknowledged, to be delivered to the defendants, at New Orleans, at 35 cents per sack. [Record p. 7.]

On the same day, Sherwood, Karns & Co. drew their bill of exchange for $2,500, in the following words: [Rec. p. 6.]

"$2,500. "ST. LOUIS, Aug. 31, 1867.

"Twenty days after date, pay to the order of ourselves, with current rate of exchange on New York, twenty-five hundred dollars, value received, and charge the same to account of shipment 1,200 bags white corn, per Bee and barges, 50 bags yellow corn.

"SHERWOOD, KARNS & CO.

"*To Mess. Hamilton & Dunnica, New Orleans, La.*"

This bill of exchange was attached to the bill of lading, and then sold, endorsed, and delivered with the bill of lading, to Cole Bros., another mercantile firm in St. Louis, on the same day, and the proceeds paid to Sherwood, Karns & Co., in cash, or a check. This bill and the bill of lading were then deposited in a St. Louis bank for collection, and forwarded to the drawees, the defendants in error, who accepted it, without any notice of any difficulty in the matter, and at maturity, the bill was paid by the defendants in error. [Record p. 13. Marginal p. 35. Also, p. 11.]

Shortly after this bill of lading was issued and transferred to Cole Bros., the steamer Bee and barges left St. Louis, and proceeded on their voyage to New Orleans. On reaching Price's Landing they stopped, and received this corn, on the order of Booth & Sons, and proceeded until they reached Cairo, Illinois, where they landed. While lying at Cairo, the plaintiffs in error caused an attachment, issued against the goods and chattels of Sherwood, Karns & Co., to be levied upon this corn, as their property. The corn was taken out of the boat by the sheriff, or marshal, and after notice by publication against Sherwood, Karns & Co., judgment by default was rendered against them, with a special execution against this corn. Upon this execution the corn was sold, and the net proceeds thereof paid over to plaintiffs in error. [Record pp. 23, 24.]

Defendants in error, who are partners, residents and doing business in New Orleans, Louisiana, brought this suit against plaintiffs in error, residents and doing business in Cairo, Illinois,

to the January Term, 1868, of the Circuit Court of the United States, Southern District of Illinois, and obtained judgment February 15, 1869, for 3,436.24 dollars. A motion for a new trial being overruled, plaintiffs have brought the cause upon writ of error to this court. Much testimony was introduced which seems to have but little bearing upon the issues in the case. From this testimony it appears that when this corn was purchased by Sherwood, Karns & Co. they were in usual credit, doing business as usual; that Cole Bros. bought the bill of exchange without any notice of the manner in which the corn had been bought, or of the fact that it was not paid for, or that it was not on board the Bee and barges when the bill of lading was issued, or that Sherwood, Karns & Co. were insolvent. They did not know who was the vendor of the corn, but bought the bill of exchange at the customary rates and in the usual course of trade. The testimony further shows that Sherwood, Karns & Co. did not suspend payment until three or four days after this purchase, that they failed to pay for this corn, that it was, prior to the sale to them, the property of plaintiffs in error, and that they owed plaintiffs in error for the corn. It would also appear, that although it was not very common for boats to issue bills of lading upon orders for produce, before the produce was actually received, yet they not unfrequently did so issue them, upon such orders. [Rec., pp. 8, 37, 38, 40.]

It also appears from the evidence, that Sherwood, Karns & Co. were largely indebted to defendants in error, and that by a previous agreement between them it was understood that the surplus proceeds of any shipment to them by Sherwood, Karns & Co., after paying the special draft or bill of exchange upon it, was to be applied to the credit of their general account. [Rec., p. 12.]

An attempt was made to prove Sherwood, Karns & Co.'s insolvency when the corn was bought, and that it was not customary to issue bills of lading before the actual receipt of the corn, and various other matters deemed by counsel for defend-

ants in error wholly irrelevant. After closing the testimony, the court below gave the following instructions:

No. I. "If the jury believe, from the evidence, that Sherwood, Karns & Co., being the owners of the corn in question, shipped the same to Hamilton & Dunnica, taking a bill of lading therefor, and that it was the understanding of both the consignors and the consignees that the proceeds were to be applied in liquidation of indebtedness from the former to the latter, then the corn, after its delivery to the carrier, was so far the property of the consignees as to authorize them to maintain an action against the creditors of the consignors for causing it to be attached while on its transit to the consignees."

No. II. "So, if the jury believe, from the evidence, that Sherwood, Karns & Co., being the owners of the corn in question, shipped the same to Hamilton & Dunnica, taking a bill of lading therefor, and that they at the same time drew a draft on Hamilton & Dunnica, against the proceeds of the corn, payable to their order, endorsed by them, and attached the bill of lading to the draft, and delivered the same to Cole Brothers, then the corn, after its delivery to the carrier, was so far the property of the consignees as to authorize them to maintain an action against the creditors of the consignors for causing it to be attached while on its transit to the consignees." [See Record p. 42.]

The plaintiffs in error asked the court to give the following charges, or instructions, which the court refused to give, and plaintiffs excepted:

1st. "The court instructs the jury that, if they believe, from the evidence, that the corn in question was the property of Sherwood, Karns & Co., at the time the same was shipped; that at said time Sherwood, Karns & Co. were indebted to Hamilton & Dunnica, and that an agreement was then in force between said firms that the former was to make shipments of produce to the latter, as their factors; that Sherwood, Karns & Co. were

to be at liberty to draw their drafts against such shipments, and that any surplus or margin of said proceeds as might be left after the payment of such drafts and expenses, were to be credited on the indebtedness aforesaid; that such agreement did not give Hamilton & Dunnica any lien upon such corn over and above the amount of the draft read in evidence, until said corn, or the bill of lading therefor, came into their possession; and if the jury believe, from the evidence, that said corn was taken in attachment, as the property of Sherwood, Karns & Co., before either the corn or the bill of lading therefor came into the possession of Hamilton & Dunnica, then the latter had no lien on said corn beyond the amount of the draft drawn against it, and the plaintiff cannot recover in this action for such surplus value."

2d. "That, if the jury believe, from the evidence, that the corn in question was, at the time of the shipment thereof, the property of Sherwood, Karns & Co.; that at said time Sherwood, Karns & Co. were indebted to Hamilton & Dunnica, and an agreement was then in force between said firms that the former were to ship produce to the latter, as their factors, and that Sherwood, Karns & Co. were to be at liberty to draw their drafts on Hamilton & Dunnica against the proceeds of said shipments, and that any surplus of such proceeds, over and above the amounts of such drafts and expenses, was to be credited on the indebtedness aforesaid; that such agreement did not give to Hamilton & Dunnica a lien on said corn until the same or a bill of lading therefor was delivered to them; and if the jury further believe, from the evidence, that Sherwood & Karns drew their draft, read in evidence, on Hamilton & Dunnica, against the proceeds of said corn, attached thereto the bill of lading, read in evidence, and negotiated the same to Cole & Brothers, and that Cole & Brothers, on the 4th of September, 1867, sent said draft, with said bill of lading so attached, to New Orleans for collection; but that before said draft, or bill of lading, or the said corn, were received by Hamilton & Dunnica,

the said corn was taken in attachment as the property of said Sherwood, Karns & Co., then Hamilton & Dunnica never acquired a lien on said corn, and cannot recover therefor in this action."

3d. "That if the jury shall believe from the evidence that the corn in question in this suit was levied upon and taken by an officer to whom the attachment writ in evidence before the jury was directed, that the defendants would not be liable to the plaintiffs therefor in this suit, unless the jury shall further believe from the evidence that the defendants, or some of them, directed the officer to make the seizure, or personally interfered with or took control of said corn." [Rec. p. 41.]

From the instructions given and those refused, the facts of this case seem to be admitted on both sides to be substantially as follows:

That Sherwood, Karns & Co., commission merchants of St. Louis, had an arrangement or agreement with Hamilton & Dunnica, of New Orleans, defendants in error here, by which the former were to ship produce to the latter, and were to draw from time to time drafts on defendants predicated on such shipments, which defendants were to accept and pay, and that in case of any balance becoming due to defendants over and above the proceeds of any shipment, the surplus of any other shipment was to be applied in payment of such balance, that there was a balance due defendants from Sherwood, Karns & Co. of about $10,000, that while such agreement was in force, Sherwood, Karns & Co. purchased the corn in dispute and shipped it to defendants, that at the same time they drew a bill of exchange on defendants upon that shipment for $2,500, nearly the value of the corn, and sold it to Cole Brothers, for cash, delivering with it the bill of lading for the corn.

That while the boat with the corn on board was proceeding on her voyage, the plaintiffs in error caused the corn to be seized under an attachment against the consignors, Sherwood, Karns

& Co., and converted it to their own use. That the consignees had accepted, and at its maturity paid this bill of exchange.

Another fact, not directly alluded to in the instructions, but having an important bearing upon the case, is found in the testimony of Nathan Cole. [Rec., pp. 26 and 28; marginal paging, 69, 76, 77.] It is this: Cole Brothers were connected with defendants, as correspondents, or, perhaps, we might say agents for procuring shipments to defendants, and had advertised that they would make advances upon shipments made to Hamilton & Dunnica. They had often made such advances upon shipments made by Sherwood, Karns & Co. The bill of lading for this shipment had been delivered to them, for value, before the attachment issued.

Upon this state of facts, well established by the testimony, the plaintiffs in error asked the court below to lay down the following legal propositions:

1st. That although Sherwood, Karns & Co. had an agreement with defendants by which they were to be allowed to make shipments to defendants, draw upon said defendants on the faith of such shipments, with the further agreement that any surplus remaining over, after the payment of such special drafts, was to be applied in payment of any balance of account in favor of defendants, yet such agreement did not give to defendants any right to the proceeds of such shipment, beyond the amount of such draft, until either the shipment itself, or the bill of lading therefor, came to the hands of defendants.

2d. That although Sherwood, Karns & Co. had shipped the corn to defendants, had drawn against the proceeds thereof, upon defendants, and had sold for value, and delivered to Cole Bros. the bill of exchange and the bill of lading; and although by agreement of the parties any surplus of proceeds was to be applied to an existing balance against the shippers, all these facts gave defendants no right to the corn, until it, or the bill of lading came to the hands of defendants.

3d. That if an officer of the law seized the corn under a writ of attachment issued at the instance and for the benefit of plaintiffs in error, yet *they* would not be liable to an action of *trover* or *trespass*, unless they directed the officer to make the seizure, or personally interfered with or took the control of the corn, even though the corn was the property of defendants in error, and plaintiffs in error received and appropriated the proceeds thereof to their own use with full knowledge of the facts

I submit that neither of these propositions can be maintained.

The first and second entirely confound the distinction between a mere lien and a complete title to the property.

The authorities are clear and abundant, that the acceptor or the purchaser of a bill of exchange, drawn against the proceeds of specific chattels delivered to a carrier, or any third person, and distinctly set apart, either by the delivery of the bill of lading for the chattels to the purchaser or the acceptor, or by any act which clearly shows the intent to transfer the possession or control of the goods from the consignor, vests in such purchaser or acceptor not a lien merely, but the title and the right to the possession of the goods, and gives him a right of action against any one interfering either with the title, or the possession of the goods The ownership is changed. It is no longer in the consignor. The property is not subject to an attachment for his debts any more than if he had parted with the possession upon a bona fide sale and delivery, for value, to a third person.

Therefore, the question of actual possession has no place here. It is not a *lien*, which often depends upon such possession, that is to be upheld, it is a *title* coupled with the right of possession, or, to speak more accurately, with a constructive possession. The carrier becomes the agent of the consignee, and his possession enures to the benefit of the consignee. An actual transfer of possession has been made by the delivery to the carrier of the property, and by the delivery of the bill of lading, the carrier's receipt and contract, to the purchaser of the bill of exchange, or to the consignee. By that act, the consignor has lost all power to change the direction of the consignment, and has parted with

all control over the shipment. It now stands for the security of the bill of exchange in whose soever hands it may come. The title is vested in the consignee for the security of this bill, and when it is accepted and paid, the ownership and possession are with the consignee for his own benefit.

Having thus the title and the right of possession, an action accrues to him against any person interfering with his rights, and his right of recovery must be co-extensive with the extent of the damage inflicted by the wrong-doer.

What is the damage thus inflicted? This question is answered very easily, by inquiring what he has lost by this interference with his rights. Take the case at bar.

If the plaintiff in error had allowed this corn to go to New Orleans, Hamilton & Dunnica, the consignees, had the undoubted right to sell it, and under the agreement with Sherwood, Karns & Co., apply the proceeds, 1st, to the payment of this draft for $2,500 drawn against it; and 2d, to apply the surplus, if any, towards the payment of the balance due them for prior advances. This would, of course, consume or appropriate the entire proceeds of the corn.

By the attachment, these rights were interfered with, and the consignees have consequently been damaged to the full extent of the value of the corn. This, then, furnishes the true measure of damages, and this was the measure fixed by the instructions given by the court below.

Plaintiffs seem to have had in view legal principles formerly applied to the case of a shipment made for the sole purpose of paying a pre-existing debt or balance, where no draft upon the shipment was drawn. In such cases it was formerly held that the property must come to the actual possession of the consignee before his lien for the balance of account would attach.

This principle has been greatly modified, if not entirely overthrown, by more recent decisions. But the case at bar rests upon no such principle, either as originally held or as subsequently modified. This suit was not brought to enforce a lien, but to recover the value of property, the title to which had been

vested in defendants in error. They had a right to this corn, and a right to have it delivered to them, to meet the bill which had been sold by the shipper, and the price of which, when paid to him, represented the purchase money for the corn, and the special agreement with Sherwood, Karns & Co. gave them the additional right to any surplus.

That is, the sale, and ultimate acceptance and payment of the draft, gave the defendants the legal title to the corn, and the agreement respecting the surplus gave them all the equitable interest of Sherwood, Karns & Co., so that the entire interest in the corn was vested in the defendants, from the moment it was placed on board the Bee and barges. Nothing less than the entire value of the corn and interest will furnish any adequate compensation for the damage inflicted by the trespass of plaintiffs in error. Any other view of the case would shake the confidence of the commercial world in the validity and value of bills of exchange, predicated upon consignments, and would work untold mischief. The value of such paper depends upon the certainty that the property consigned to meet it will be promptly and faithfully delivered according to the tenor of the bill of lading, and that a purchaser can safely buy, and the consignee can safely accept such bill, relying upon the property consigned to furnish the fund for its payment.

If a creditor of the consignor can interfere with the delivery of a shipment thus pledged for a special debt, in the hope of forcing the consignee to take, at the end of a long and vexatious litigation, the face of the bill and interest, and thus possibly save a small amount for his own debt, the law would offer a premium to the trespasser, and instead of making such bills a prompt and reliable medium of exchange, would render them the most uncertain and insecure of all commercial paper.

The propositions of law laid down by the court below, in its instructions to the jury, are substantially as follows:

1st. That the delivery of the corn to the carrier, under a bill of lading, by which he bound himself to deliver it to defendants

in error, who, by a previous agreement with the owners and shippers thereof, were to apply the proceeds to the payment of an existing balance against them, vested in the defendants such an interest in the corn as would give them the right to maintain this action against the plaintiffs in error, attaching creditors of the shippers.

2d. That if the owners of the corn shipped it under a bill of lading to defendants in error, and at the same time drew a bill of exchange upon defendants, against the proceeds, and endorsed the same and delivered it, with the bill of lading, to Cole Brothers, then the corn, after its delivery to the carrier, was so far the property of the consignees as to authorize them to maintain this action.

There is authority for both these propositions; although, for the first, the authorities are not uniform. Many of the older cases held that where there was nothing but a general balance, the right of the consignee did not attach until the shipment, or the insignia of title, the bill of lading, came to the hand of the consignee.

The more recent authorities seem to be the other way, and hold, with the court below, that where there is an agreement between the shipper owning the property and the consignee, that the proceeds of the shipment shall be applied to the payment of an existing balance, in such case, a delivery to the carrier, under a bill of lading which binds him to deliver to the *consignee*, constitutes a constructive delivery that will entitle the consignee to the proceeds, as against the consignor or his creditors.

I would refer the court to the following authorities, in support of this proposition:

Russell on Factors and Brokers, 45 Law Lib., 202.

Bryans vs. Nix, 4 Mees. and Wels., 775, op. on p. 790-1.
Rice vs. Austin, 17 Mass. R., 197, op. on p. 204.
Anderson vs. Clark, 2 Bing. 20.

Mr. Russell, in his work above quoted, after alluding to the doctrine of the earlier cases, says: "On referring, however, to more recent cases on this subject, it will be found that our courts have now changed their views with reference thereto, and it appears that at the present day a factor's right of lien on goods, the insignia of which only have come to his hands, will depend on the question, 'was it the intention of the consignor to vest the property in the consignee, from the moment of delivery to the carrier?' And it is said that, if the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels be established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier or ship-master, employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and that it matters not by what document this is effected, nor is it material whether the person, who is to have the property, be a factor or not; for, such an agreement may be made with a factor, as well as with any other individual. Whenever, therefore, the bill of lading, or other document, operates as evidence of a change of property, the factor will be entitled immediately on receipt thereof, to claim his lien, and on the

arrival of the goods, he will have the right to insist on their being delivered to him, in order that he may retain them by virtue thereof." See Russell on Factors, 45 Law Lib., 203.

Authorities might be multiplied if the case at bar depended upon establishing the proposition contained in the first instruction. But the facts disclosed by the testimony show that defendant's right of recovery rests on far stronger grounds than those supposed in this instruction, and that while the instruction was wholly unnecessary it could have had no influence prejudicial to plaintiff's rights, and if the giving of it was error, it was a harmless error.

In the case before the court, a price was paid to the shipper for the property shipped, and a full surrender of all possession and control of the corn took place when Sherwood, Karns & Co. drew their bill of exchange on defendants, and sold and delivered it with the bill of lading to Cole Brothers. This act changed the title of the property. Everything necessary to effect a complete transfer of the property was done. The specific lot of corn was set apart and marked. It was all the corn the original owners had at that point. It was purchased by Sherwood, Karns & Co., and on the order of J. W. Booth & Sons, the factors, through whom the sale was made, it was delivered to the carrier, thereby enabling him to meet the requirements of his bill of lading. It was consigned to defendants, and all power to change the direction of the shipment was surrendered when the bill of lading was surrendered to Cole Brothers, with intent thereby to give them control of the shipment through the consignees, to meet the bill drawn upon it.

The delivery of the bill of lading to Cole Bros. was equivalent to a delivery of it to defendants. They were the correspondents of defendants, acting as special agents to secure shipments to them, making advances upon such shipments, to carry out the general purposes of the agency. If therefore, under any circumstances, it were necessary that the bill of lading should actually come to the possession of consignees, the requirement was fully met by its coming to the hands of their agents.

The reason of the requirement seems to be that the consignor may not have it in his power to change the direction of the shipment. This would be equally impossible to him, whether the bill of lading were in the hands of consignees in person, or in the hands of their agent, or of a holder of a bill of exchange drawn upon the shipment, having no other connection with the transaction.

Nor does it matter that defendants did not accept the bill until after the corn was attached. By the arrangement between defendants and Sherwood, Karns & Co., the latter had a right to draw upon any shipments made to defendants, so that after they had drawn, and sold the bill, defendants were under an obligation to accept and pay it, or at least to secure the corn and dispose of it to meet the bill.

But it nowhere appears that defendants knew the corn had been attached, at the time they accepted the bill.

The second instruction was therefore the only one required by the facts of the case.

It covered the whole ground, superseding, and rendering unnecessary and wholly immaterial the first instruction, and it correctly set forth the law of the case.

Nesmith et al. vs. The Dyeing and Bleaching Company, 1 Curtis, C. C. Reps., 130.

Gibson vs. Stevens, 17 Curtis's U. S. Sup. C. R. 631.

Valle vs. Cerre, 36 Mo. Rep. 575.

The latter case, Valle vs. Cerre, was one where there was a general arrangement that the consignor should make shipments to the plaintiffs, drawing on them to the extent of three-fourths the value of the shipments, and that the proceeeds of all shipments should go to the credit of consignor to pay special advances, and also, any general balances that might arise in their course of dealing.

In the progress of the business, a balance of some $10,000 had accumulated against the consignor. He then consigned to plaintiffs a lot of coffee, the property in dispute, and at the same time drew on them for $4,200, being a little over three-fourths of its actual value, and sold the bill, receiving $2,000 upon it, the purchaser declining to pay any more until the bill should be accepted. The invoice and bill of lading were sent to and received by plaintiffs, but they refused to accept the bill of exchange.

A creditor of the consignor attached the coffee before it reached the plaintiffs, who were the consignees. Plaintiffs replevied the coffee, and refunded the $2,000 to the holder of the bill. The Supreme Court of Missouri decided that they had a property in the coffee, which gave them a right to recover. Justice Holmes, in delivering the opinion of the court (page 586), says, "On this state of facts, a jury would be well warranted in finding that the shipment had been made to cover advances, and the general balance of account, and that the delivery to the carrier was a constructive delivery to the consignee, and vested in him a present lien and property in the goods consigned. It would be equivalent to a shipment and delivery to the carrier, upon an order of the consignor, upon his own account."

Again, on p. 588, says the court, "where acceptances have actually been given upon the faith of a consignment by bill of lading, there can be no doubt that the consignee acquires such a lien, or property in the goods, as no subsequent act of conveyance can divest; such an acceptance is held to be an advance upon the particular shipment."

And again, speaking in reference to a general balance only,

Justice Holmes says: "It matters not whether the lien for a balance of account arises by operation of law, from the usage of trade, or from the positive and special agreement and understanding of the parties. * * * * In such case the shipment and delivery of the goods to the carrier, under the bill of lading, amounts to a specific appropriation of the property, with an intention that it shall be a security or a payment to the consignee, for the advances he has made."

The case at bar is still stronger for defendants in error than the one above. There was not only this general understanding between the consignor and consignees that the surplus of proceeds of all shipments should go to the credit of shippers on account of any balance due from them, but there was also a special draft sold to Cole Bros., and accepted by consignees. [See Record, page 33, marginal page 89; also, Rec. page 12, marg. 31.]

To the same effect is Dasheals vs. Pope et al., 6 Ala. 690, in which Justice Goldthwaite sums up the doctrine, on page 694, as follows:

"The mere agreement to ship goods in satisfaction of antecedent advances, will not, in general, give the factor or consignee a lien upon them for his general balance, until they come to his actual possession; but if there is a specific pledge or appropriation of certain ascertained goods, accompanied with the intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee, then the property is changed, and vests in the individual to whom they are to be delivered by the depositary."

Citing Cross on Liens, 32 Law Lib., p. 253.
Also Haille vs. Smith, 1 Bos. & Puller, 563, opin. p. 570.
See also Kollock vs. Jackson, 5 Geo. Rep. 153, op. p. 155.
Davis & Aubin vs. Bradley et al., 28 Vt. 118, op. p. 124.
Holbrook vs. Wright, 24 Wend. 169, op. on pp. 173, 174.
Wade vs. Hamilton, 30 Geo. 450.

Brownell vs. Carnley, 3 Duer. 9, op. p. 12.
Funkhouser vs. Dutcher, 14 La. An. 494,
Cumming vs. Brown, 9 East. 506.
Morrison vs. Gray, 2 Bing. R. 260.
Davenport Bank vs. Homeyer *et al.*, 45 Mo. 145.

In delivering the opinion of the court, in the case of Nesmith vs. The Dyeing and Bleaching Co., 1 Curtis' C. C. Rep. 130, Justice Curtis remarks:

"The property acquired by depositing the goods in the hands of a third person, under an agreement that they shall be delivered to one who has advanced money or negotiable paper on account of them, and shall be by him sold, is something more than a lien. The legal title to the property may be considered as passing to him, for the purposes indicated by the agreement."

See opin., p. 135.

In the case of Gibson vs. Stevens, (8 How. U. S. 384,) 17 Curtis, 631, on p. 635, Ch. J. Taney, delivering the opinion of the court, says:

"Nor, as respects the legal title, can there be any distinction between the advance made by Gibson and the case of an actual purchaser. To the extent of his advances he is a purchaser, and the legal title was conveyed to him to protect his advances. It is not like the lien of a factor who makes advances for his principal upon goods in his possession. But even in that case the property cannot be withdrawn from his hands until his advances are repaid. But in the case before us, the title of Gibson is not a mere lien. The legal title—the right of property—passed to him, and McQueen and McKay retained nothing but an equitable interest in the surplus, if any remained after satisfying the claims of Gibson." * * * Again the court says, p. 636, "As between him and the creditors of McQueen and McKay, the property and the possession vested in him at the time of the transfer and delivery of the documents." * * * "Neither is the equitable interest of McQueen and McKay in the surplus, if any remain, material to the decision. This equitable interest is no doubt liable to attachment by the laws of Indiana. But that liability will not authorize the attaching creditor to take the property out of the hands of the legal owner before his claims on it are discharged."

In Cummings vs. Brown, found in 5 East. (new edition), on p. 249, Lord Ellenborough, C. J., delivering the opinion of the Court, says: "If a bill of lading should be held by us not assignable, under these circumstances, the consequence would be, no bill of lading could be deemed safely assignable before the goods arrived, unless the assignee of the bill of lading was perfectly assured that the goods were paid for in money, or paid for in account between the parties, which is the same thing: a position which would tend to overthrow the general practice and course of dealing of the commercial world on this subject, and which is warranted, as we conceive, by no decided case on the subject."

As to the point made, or attempted to be raised by the third

instruction asked by plaintiffs in error, and refused by the court, there seems to be no evidence on which to base such an instruction.

From all the testimony, it is clear that this is not the case where a party sues out legal process and places it in the hands of the sheriff, to be executed in the ordinary course of his official duty. But the attachment was taken out to stop and seize this very property. The defendants in the attachment were residents of St. Louis, Mo. The property consisted of a lot of corn sold to them by the attaching creditors, and shipped on a steamer and barges, bound for New Orleans. It was consigned to defendants in error, which constituted of itself notice of some claim or interest in defendants in error. Plaintiffs in error were the only parties at Cairo, Ills., who could have known of this shipment, or of Sherwood, Karns & Co.'s interest in, or connection with this corn, and therefore must have directed the officer to make the seizure. There is no evidence leading to an opposite conclusion. In addition to this, John N. Booth, a witness for plaintiffs in error, testifies that "they (plaintiffs in error) told me that the corn was attached; my impression was from what they told me, that they attached the corn; that was my understanding, and I have no doubt they got the corn." [Record p. 37.]

The same witness also previously stated, "I took no steps until the 4th of September to stop the delivery of the corn." (Rec. p. 36 and 7.) The corn was attached on the next day, Sept. 5th, 1867. In addition to this, plaintiffs in error received the proceeds of the corn. (Rec. p. 24, marg. 63.)

The plaintiffs in error became trespassers, *ab initio*. They also converted the property, or its proceeds, to their own use. The action brought against them was trover, with a count in trespass.

"Trover is a form of remedy adopted to recover damages for an injury occasioned to a person having the property in, and right of possession to personal property, which is wrongfully converted by defendant to his own use. The foundation of the action is

not the acquisition of property by the defendant, but the deprivation of property to the plaintiff."

If a Sheriff illegally take the goods of A. on an execution against B., this action will lie against the Sheriff's vendee.

2 Saund., Pl. and Ev., Part 2, 1138 and 1086.

Farrant vs. ———, 3 Stark. R. 130.

Farrant vs. Thompson, 2 Dow. and Ry., 1.

Also 2 Bing. 260, cited above.

20 Penn. R. (8 Harris) 228, on p. 235.

1 Chitty's Pl. 146, 147, 167, 90, 192.

2 Stark. Ev. 839.

This action will lie wherever one wrongfully converts to his own use property belonging to another. It matters not by what means or through what agency the defendant acquired the possession. If his possession is wrongful, or he refuses to restore the property upon a lawful demand, or converts it to his own use so that he cannot restore it, he is liable in trover.

There was, therefore, no error in refusing to give the last instruction.

Upon the whole case, defendants in error submit that justice has been fully administered, according to law, and that the judgment should be affirmed.

GEO. P. STRONG,
Att'y of Defts. in Error.